

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

FOR MR. JUSTICE GEORGE

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

OCTOBER TERM, 1931

No. 5536

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, APPELLANT,

vs.

FRANK GLADSON LEYS.

AND

No. 5537

DISTRICT OF COLUMBIA, ~~A MUNICIPAL CORPORATION, APPELLANT,~~

vs.

ROBERT H. LEYS.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

FILED OCTOBER 29, 1931.

PRINTED NOVEMBER 17, 1931.

Court of Appeals of the District of Columbia

OCTOBER TERM, 1931

No. 5536

DISTRICT OF COLUMBIA, A MUNICIPAL
CORPORATION, APPELLANT,

vs.

FRANK GLADSON LEYS, APPELLEE.

AND

No. 5537

DISTRICT OF COLUMBIA, A MUNICIPAL
CORPORATION, APPELLANT,

vs.

ROBERT H. LEYS, APPELLEE.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5536.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,

vs.

FRANK GLADSON LEYS,

and

No. 5537.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,

vs.

ROBERT H. LEYS.

a Supreme Court of the District of Columbia.

At Law.

No. 76152.

FRANK GLADSON LEYS, Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation, Defendant.

At Law.

No. 76256.

ROBERT H. LEYS, Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation, Defendant.

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said

District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1

Declaration.

Filed Dec. 11, 1928.

In the Supreme Court of the District of Columbia.

No. 76152.

FRANK GLADSON LEYS, Plaintiff,

VS.

DISTRICT OF COLUMBIA, a Municipal Corporation, Defendant.

Plaintiff, Frank Gladson Leys, sues the defendant, the District of Columbia, a Municipal Corporation, for that heretofore on to-wit January 17, 1926, at or about six o'clock P. M. plaintiff was lawfully engaged in walking on the sidewalk on the south side of B Street, Southeast, between Maryland Avenue and Second Street, Southeast; and it then and there became and was the duty of the defendant to keep and maintain said sidewalk in repair and in a safe condition in order that the plaintiff might not be injured; but in violation of said duty said defendant, its agents, servants, and employees negligently suffered and permitted said sidewalk to become defective, to-wit, in permitting a brick or bricks in front of to-wit premises numbered 27 B Street, Southeast, and constituting a part of said sidewalk to become broken, crumbled, loosened or sunken below the level of said sidewalk so that plaintiff in walking thereon was violently precipitated and thrown upon said sidewalk and was gravely and seriously injured

as a result thereof; and plaintiff then and there became and was sick, sore, lame and disordered and will continue so; wherefore plaintiff suffered, suffers and will continue to suffer great physical pain and mental anguish; wherefore plaintiff was compelled to expend various sums of money, to-wit, Five Hundred Dollars (\$500.00) in and about an endeavor to heal and cure himself of the bruises, injuries and pain so contracted and sustained; wherefore plaintiff files this suit and claims of the defend-

2

ant the sum of Twenty Thousand Dollars, (\$20,000.00) beside- costs.

NORMAN B. FROST,
FREDERIC N. TOWERS,
Attorneys for Plaintiff.

Motion.

Filed Jan. 7, 1929.

* * * * *

Now comes the defendant, the District of Columbia, a municipal corporation, by its attorneys, and moves this Honorable Court to require the plaintiff to make the declaration filed in the above entitled cause more definite and certain in the following respects.

1. By showing the point on the highway where the alleged injury was sustained.

2. By showing specifically the location in the District of Columbia of the highway where the alleged injury was sustained.

WILLIAM W. BRIDE,
THOMAS F. CAMERON,
Attorneys for the Defendant.

3 To Norman B. Frost, Esq.,
Frederick N. Towers, Esq.:

Take notice: The foregoing motion will be called to the attention of the Justice holding Circuit Court on the 11th day of January A. D., 1929, at ten o'clock, A. M., or as soon thereafter as Counsel may be heard.

WILLIAM W. BRIDE,
THOMAS F. CAMERON,
Attorneys for the Defendant.

Amended Declaration.

Filed Jan. 18, 1929.

* * * * *

The plaintiff, Frank Gladson Leys, sues the defendant, the District of Columbia, a Municipal Corporation, for that heretofore, on to wit, Sunday, January 17th, 1926, at or

about six (6) o'clock P. M., plaintiff was lawfully engaged in walking on the sidewalk on the south side of B Street, Southeast, between First Street and Second Street, Southeast, in the District of Columbia, and it then and there became and was the duty of the defendant to keep and maintain said sidewalk in repair and in safe condition, in order that the plaintiff might not be injured, by reason of defendant's neglect of duty to keep said sidewalk in reasonably safe repair; but, in violation of said duty, said defendant, its agents, servants, and employees, negligently suffered and permitted said sidewalk to become out of repair and defective, to wit, in permitting a brick or bricks in the sidewalk in front of, to wit, premises numbered 109 B Street, Southeast, and constituting a part of said sidewalk,

4 walk, to become broken and loosened, so that it was not securely placed as part of said sidewalk and left a hole in part of said sidewalk, which negligent condition had existed for a long time, of which said defendant had notice, so that plaintiff in walking thereon, while herself in the exercise of reasonable care under the circumstances, was violently precipitated and thrown upon said sidewalk and was gravely and seriously injured as a result thereof; her right arm and hand, shoulder, neck, spine and foot were permanently injured, and she still remains sore, lame and disordered; wherefore plaintiff suffered, suffers and will continue to suffer great physical pain and mental anguish; wherefore plaintiff was compelled to expend various sums of money, to wit, Five Hundred Dollars (\$500.00) in and about an endeavor to heal and cure herself of the bruises, injuries and pain so contracted and sustained, and she lost much time from her employment as organist and seamstress, with large loss of earnings.

Wherefore plaintiff files this suit and claims of the defendant the sum of Twenty Thousand Dollars (\$20,000.00) besides costs.

NEWMYER & KING,
A. L. NEWMYER,
Attorneys for Plaintiff.

Plea.

Filed Jan. 23, 1929.

* * * * *

Comes now the defendant, the District of Columbia, and for a plea to the amended declaration filed in the above entitled cause admits that it is a municipal corporation, and being without knowledge or information sufficient to form a belief, denies each and every other allegation therein contained.

WILLIAM W. BRIDE,
THOMAS F. CAMERON,
Attorneys for Defendant.

Joinder in Issue.

Filed Jan. 25, 1929.

* * * * *

The plaintiff joins issue upon the plea filed by the defendant in the above entitled cause.

ALVIN L. NEWMYER,
MILTON W. KING,
Attorneys for Plaintiff.

Notice of Trial.

To Messrs. Wm. W. Bride and Thomas F. Cameron,
Attorneys for Defendant,
C/o office of Corporation Counsel:

Please take notice that the issues joined in the above cause will be tried at the next term of court.

ALVIN L. NEWMYER,
MILTON W. KING,
Attorneys for Plaintiff.

Note of Issue.

Title: As in caption above.

Attorneys for Plaintiff: Newmyer and King.

Attorneys for Defendant: Wm. W. Bride and Thomas F. Cameron.

Date of last pleading: — —, — —.

6 Supreme Court of the District of Columbia.

Thursday, May 14, 1931.

Session resumed pursuant to adjournments, Hon. Jennings Bailey, Joseph W. Cox, James M. Proctor, Justices, presiding.

* * * * *

The above entitled cause being duly assigned for trial and upon the calling of the same the plaintiffs pray leave to amend their respective declarations and after consideration it is ordered that said plaintiffs be and they are hereby granted leave to amend their respective declarations and the said causes are continued for trial on May 20, 1931.

PROCTOR,
Justice.

Amendment to Amended Declaration.

Filed May 14, 1931.

* * * * *

Leave of court first obtained, the plaintiff amends the amended declaration filed herein by changing the words on lines fourteen and fifteen of the first page of said declaration, "in front of, to wit, premises 109 B Street, S. E.," to the words "in front of, to wit, premises numbered 107 B Street, S. E."

ALVIN L. NEWMYER,
Attorney for Plaintiff.

Leave to file granted.

JAMES M. PROCTOR,
Justice.

7

Plea to Amended Declaration.

Filed May 18, 1931.

* * * * *

1. Comes now the defendant, the District of Columbia, and for a plea to the second amended declaration filed in the above entitled cause, admits that on, to wit, January 17, 1926, the plaintiff was lawfully engaged in walking on the sidewalk on the south side of B Street, Southeast, between 1st and 2nd Streets, Southeast, in the District of Columbia, but denies that it had either actual or constructive knowledge that any brick or bricks in the said sidewalk in front of, to wit, premises No. 107 B Street, Southeast, being broken or loosened, so that it was not securely placed as part of said sidewalk, or as to leave a hole in

part of said sidewalk, and denies each and every other allegation in said amended declaration contained.

2. And for a further plea to the second amended declaration the defendant, the District of Columbia, denies that the plaintiff received the injuries alleged therein by reason of brick or bricks being broken or loosened so that it was not securely placed as part of the sidewalk, or as to leave a hole therein in front of, to wit, premises No. 107 B Street, Southeast, in the District of Columbia, and further avers that if the plaintiff was injured while walking on the sidewalk on the south side of B Street, between First and Second Streets, Southeast, on the date alleged in said amended declaration, she was injured while walking in front of premises 109 B Street Southeast, but denies that such injuries were caused by the neglect or failure of the defendant to maintain said sidewalk in a reasonably safe
8 condition, and denies each and every other allegation in said declaration contained.

3. And for a further plea to the second amended declaration filed in the above entitled cause the defendant, the District of Columbia, says that the cause of the action therein alleged did not accrue within three years from the filing of the said second amended declaration.

WILLIAM W. BRIDE,
Corporation Counsel, D. C.;
THOMAS F. CAMERON,
Assistant Corporation Counsel, D. C.,
Attorneys for Defendant.

Joinder of Issue on Plea to Amended Declaration.

Filed Jun. 19, 1931.

* * * * *

The plaintiff joins issue upon each of the separate pleas filed by the defendant to the amended declaration in the above entitled cause.

A. L. NEWMYER,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

Monday, May 25, 1931.

Sessions resumed pursuant to adjournments, Hon. Jennings Bailey, James M. Proctor, Joseph W. Cox presiding.

* * * * *

9 Come now the parties hereto in each of the above entitled causes by their respective attorneys of record and it being agreed between the said parties that these causes may be consolidated for the purpose of trial before the same jury it is so ordered. Whereupon, comes now a jury of good and lawful men and one woman of this district, to-wit; Lester Ellis, Thomas B. Guthrie, John H. Lynn, Jesse L. Rhodes, Sheldon Geary, Mrs. Leona Miller, William E. Weaver, Earl R. Norford, Jerry P. Harrington, Joseph A. Taylor, E. Frank Hanvey, Paul R. Oglesbee who are duly sworn to well and truly try the issue joined in each of the above entitled causes and after these causes are heard in part the jury is respited until tomorrow morning at 10 o'clock.

PROCTOR,
Justice.

Tuesday, May 26, 1931.

Sessions resumed pursuant to adjournments, Hon. Jennings Bailey, James M. Proctor, Justices, presiding.

* * * * *

Come again the parties hereto in manner as aforesaid and the same jury that was respited yesterday and after these causes are heard in part the jury is again respited until tomorrow morning at 10 o'clock.

PROCTOR,
Justice.

Memorandum.

May 27, 1931.—Verdict for plaintiff for \$7,500.00.

10

Memorandum.

June 1, 1931.—Motion for a new trial filed.

Supreme Court of the District of Columbia.

Friday, June 5, 1931.

Sessions resumed pursuant to adjournments, Hon. Jennings Bailey, James M. Proctor, Joseph W. Cox, Justices, presiding.

* * * * *

Upon consideration of the motion filed herein for a new trial it is ordered that said motion be and the same is hereby overruled and judgment on verdict is ordered.

Wherefore it is considered that plaintiff recover of defendant herein the sum of Seven Thousand Five Hundred Dollars (\$7500.00) with interest thereon until paid, together with costs of suit to be taxed by the clerk and have execution thereof.

To the foregoing judgment defendant notes an appeal to the Court of Appeals of this District.

PROCTOR,
Justice.

Memoranda.

June 24, 1931.—Proposed Bill of Exceptions filed.

July 24, 1931.—Time to submit Bill of Exceptions extended to and including September 14, 1931.

11

Assignment of Errors.

Filed June 18, 1931.

* * * * *

Comes now the appellant, by counsel, and assigns as error committed by the Trial Court, the following:

1. In permitting the plaintiffs to further amend their amended declarations, by changing the location of the alleged hole or depression.

2. In admitting in evidence, over the objection and exception of the defendant, certain paper writings purporting to be bills rendered and unpaid for medical services rendered the plaintiff, Frank Gladson Leys.

3. In admitting in evidence, over the objection and exception of the defendant, the testimony of the witness Robert H. Leys, regarding the medical services furnished the plaintiff Frank Gladson Leys, and the charges therefor.

4. In failing to direct a verdict for the defendant at the close of the plaintiffs' case upon the showing that the alleged accident occurred more than three years last past prior to the filing of the second amended declaration.

5. In failing to direct a verdict for the defendant at the close of the entire case.

WILLIAM W. BRIDE,
W.,
THOMAS F. CAMERON,
Attorneys for Defendant.

12

Designation of Record.

Filed June 19, 1931.

* * * * *

Law. No. 76152.

Comes now the District of Columbia, appellant in the above entitled cause, and designates the parts of the Record which it desires to have included in the Transcript, said parts being considered sufficient for the determination of the questions raised on appeal, viz:

1. Declaration.
2. Motion to make declaration more definite and certain.
3. Amended declaration.
4. Plea of defendant.
5. Joinder of issue, notice of trial and note of issue.
6. Amendment to amended declaration. (Minute Entry May 14, 1931.)
7. Plea to amended declaration.
8. Joinder of issue on plea to amended declaration.
9. Minute entry May 25, 1931.
10. Minute entry of trial.
11. Verdict of Jury.

12. Motion for a new trial.
13. Memo.: Motion for a new trial overruled.
14. Judgment of the Court.
15. Memorandum of notation of appeal by defendant.
16. Memorandum of filing and submission of Bill of Exceptions.
- 13 17. Bill of Exceptions.
18. Assignment of errors with memorandum of date of filing.
19. This designation of record.

WILLIAM W. BRIDE,
W.,

Corporation Counsel, D. C.;

THOMAS F. CAMERON,

Assistant Corporation Counsel, D. C.,

Attorneys for Appellant, District of Columbia.

Service of a copy of the foregoing Designation of Record acknowledged this 19th day of June, 1931.

A. L. NEWMYER,
Attorney for Appellee.
M.

14

Declaration.

Filed Jan. 16, 1931.

In the Supreme Court of the District of Columbia.

Law. No. 76256.

ROBERT H. LEYS, Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation,
Defendant.

The plaintiff, Robert H. Leys, sues the defendant, the District of Columbia, a Municipal Corporation, for that heretofore, on to wit, Sunday, January 17th, 1926, at or about six (6) o'clock P. M., plaintiff's wife, Frank Gladson Leys, was lawfully engaged in walking on the sidewalk on the south side of B Street, Southeast, between First Street and Second Street, Southeast, in the District of

Columbia, and it then and there became and was the duty of the defendant to keep and maintain said sidewalk in repair and in a safe condition, in order that the plaintiff's wife might not be injured, by reason of defendant's neglect of duty to keep said sidewalk in reasonably safe repair; but, in violation of said duty, said defendant, its agents, servants, and employees, negligently suffered and permitted said sidewalk to become out of repair and defective, to wit, in permitting a brick or bricks in the sidewalk in front of, to wit, premises numbered 109 B Street, Southeast, and constituting a part of said sidewalk, to become broken and loosened, so that it was not securely placed

as part of said sidewalk and left a hole in part of said
15 sidewalk, which negligent condition had existed for a long time, of which said defendant had notice, so that plaintiff's wife, in walking thereon, while herself in the exercise of reasonable care under the circumstances, was violently precipitated and thrown upon said sidewalk and was gravely and seriously injured as a result thereof; and said plaintiff, by reason of the injuries sustained by his said wife, has been obliged to incur large expenses for medical and surgical attention furnished said wife; and has lost the society and companionship of his said wife; and has been obliged to incur additional expense in the conduct of his home and household; all to the plaintiff's damage in the sum of Five Thousand Dollars (\$5,000.00).

Wherefore the plaintiff brings this action and claims of the defendant the sum of Five Thousand Dollars (\$5,000.00) besides the cost of this action.

NEWMYER & KING,
A. L. NEWMYER,
Attorneys for Plaintiff.

Plea.

Filed Feb. 8, 1929.

* * * * *

Comes now the defendant, the District of Columbia, by its counsel, and for a plea to the declaration filed in the above entitled cause admits that it is a municipal corporation, and being without knowledge and information suffi-

cient to form a belief, denies each and every other allegation therein contained.

WILLIAM W. BRIDE,
THOMAS F. CAMERON,
Attorneys for Defendants.

16

Joinder in Issue, &c.

Filed Feb. 12, 1929.

* * * * *

The plaintiff joins issue upon the plea filed by the defendant in the above entitled cause.

ALVIN L. NEWMYER,
Attorney for Plaintiff.

Notice of Trial.

To Messrs Wm. W. Bride and Thomas F. Cameron,
Attorneys for Defendant,
District Building:

Please take notice that the issues joined in the above cause will be tried at the next term of court.

ALVIN L. NEWMYER,
Attorney for Plaintiff.

Note of Issue.

Title: As in caption above.

Attorneys for Plaintiff: Newmyer and King.

Attorneys for Defendant: Wm. W. Bride and Thos. F. Cameron.

Date of last pleading: Feb. 11, 1929.

17 Supreme Court of the District of Columbia.

Thursday, May 14, 1931.

Session resumed pursuant to adjournments, Hon. Jennings Bailey, Joseph W. Cox, James M. Proctor, Justices, presiding.

* * * * *

The above entitled cause- being duly assigned for trial and upon the calling of the same the plaintiffs pray leave to amend their respective declarations and after consideration it is ordered that said plaintiffs be and they are hereby granted leave to amend their respective declarations and the said causes are continued for trial on May 20, 1931.

PROCTOR,
Justice.

Amendment to Declaration.

Filed May 14, 1931.

* * * * *

Leave of court first obtained, the plaintiff amends the declaration filed herein by changing the words on line fifteen of the first page of said declaration, "in front of, to wit, premises 109 B street, southeast," to the words "in front of, to wit, premises numbered 107 B street, southeast."

ALVIN L. NEWMYER,
Attorney for Plaintiff.

Leave to file granted.

JAMES M. PROCTOR,
Justice.

18 *Plea to Amended Declaration.*

Filed May 18, 1931.

* * * * *

1. Comes now the defendant, the District of Columbia, and for a plea to the second amended declaration filed in the above entitled cause, admits that on, to wit, January 17, 1926, the plaintiff's wife, Frank Gladson Leys, was lawfully engaged in walking on the sidewalk on the south side of B Street, Southeast, between 1st and 2nd Streets, Southeast, in the District of Columbia, but denies that it had either actual or constructive knowledge *that* any brick or bricks in the said sidewalk in front of, to wit, premises No. 107 B Street, Southeast, being broken or loosened, so that it was not securely placed as part of said sidewalk, or as to leave a hole in part of said sidewalk, and denies each

and every other allegation in said amended declaration contained.

2. And for a further plea to the second amended declaration the defendant, the District of Columbia, denies that the plaintiff's wife, Frank Gladson Leys, received the injuries alleged therein by reason of brick or bricks being broken or loosened so that it was not securely placed as part of the sidewalk, or as to leave a hole therein in front of, to wit, premises No. 107 B Street, Southeast, in the District of Columbia, and further avers that if the plaintiff's wife, Frank Gladson Leys, was injured while walking on the sidewalk on the south side of B Street, between First and Second Streets, Southeast, on the date alleged in said amended declaration, she was injured while walking in front of premises 109 B Street, Southeast, but denies that such injuries were caused by the neglect or failure of
19 the defendant to maintain said sidewalk in a reasonably safe condition, and denies each and every other allegation in said declaration contained.

3. And for a further plea to the second amended declaration filed in the above entitled cause the defendant, the District of Columbia, says that the cause of action therein alleged did not accrue within three years from the filing of the said second amended declaration.

WILLIAM W. BRIDE,
Corporation Counsel, D. C.;
THOMAS F. CAMERON,
Assistant Corporation Counsel, D. C.,
Attorneys for Defendant.

Joinder of Issue on Plea to Amended Declaration.

Filed May 19, 1931.

* * * * *

The plaintiff joins issue upon each of the separate pleas filed by the defendant to the amended declaration in the above entitled cause.

A. L. NEWMYER,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

Monday, May 25, 1931.

Sessions resumed pursuant to adjournments, Hon. Jennings Bailey, James M. Proctor, Joseph W. Cox, presiding.

* * * * *

20 Come now the parties hereto in each of the above entitled causes by their respective attorneys of record and it being agreed between the said parties that these causes may be consolidated for the purpose of trial before the same jury it is so ordered. Whereupon, comes now a jury of good and lawful men and one woman of this district, to-wit; Lester Ellis, Thomas B. Guthrie, John H. Lynn, Jesse L. Rhodes, Sheldon Geary, Mrs. Leona Miller, William E. Weaver, Earl R. Norford, Jerry P. Harrington, Joseph A. Taylor, E. Frank Hanvey, Paul R. Oglesbee who are duly sworn to well and truly try the issue joined in each of the above entitled causes and after these causes are heard in part the jury is respited until tomorrow morning at 10 o'clock.

PROCTOR,
Justice.

Tuesday, May 26, 1931.

Sessions resumed pursuant to adjournments, Hon. Jennings Bailey, James M. Proctor, Justices, presiding.

* * * * *

Come again the parties hereto in manner as aforesaid and the same jury that was respited yesterday and after these causes are heard in part the jury is again respited until tomorrow morning at 10 o'clock.

PROCTOR,
Justice.

21 *Memorandum.*

May 27, 1931.—Verdict for plaintiff for \$200.00/100.

Motion for a New Trial.

Filed Jun. 1, 1931.

* * * * *

Comes now the defendant, the District of Columbia, by its counsel, and moves this Honorable Court to grant and

award a new trial in the above entitled cause for the following reasons:

1. Because the verdict is contrary to the evidence.
2. Because the verdict is contrary to the weight of the evidence.
3. Because the amount of the verdict was excessive.
4. Because the court erred in refusing to grant the motion of this defendant for a directed verdict at the close of the plaintiff's testimony.
5. Because the court erred in refusing to grant the motion of this defendant for a directed verdict at the close of the entire case.
6. Because there was a variance between the allegations of the declaration and the proof.
7. Because the court erred in refusing to instruct the jury to return a verdict for the defendant.

WILLIAM W. BRIDE,
Corporation Counsel, D. C.,
THOMAS F. CAMERON,
Assistant Corporation Counsel, D. C.,
Attorneys for Defendant.

22 To Alvin Newmyer, Esquire:

Please take notice that the foregoing motion will be called to the attention of Mr. Justice Proctor on — day of June, 1931, at 10 o'clock A. M. or as soon thereafter as counsel may be heard.

WILLIAM W. BRIDE,
THOMAS F. CAMERON,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

Friday, June 5, 1931.

Sessions resumed pursuant to adjournments, Hon. Jennings Bailey, James M. Proctor, Joseph W. Cox, Justices, presiding.

* * * * *

Upon consideration of the motion filed herein for a new trial it is ordered that said motion be and the same is hereby overruled and judgment on verdict is ordered.

Wherefore, it is considered that plaintiff recover of defendant herein the sum of Two Hundred Dollars (\$200.00) with interest thereon until paid, together with costs of suit to be taxed by the clerk and have execution thereof.

To the foregoing judgment defendant notes an appeal to the Court of Appeals of this District.

PROCTOR,
Justice.

23 *Designation of Record.*

Filed June 19, 1931.

* * * * *

Law. No. 76256.

Comes now the District of Columbia, appellant in the above entitled cause, and designates the parts of the Record which it desires to have included in the Transcript, said parts being considered sufficient for the determination of the questions raised on appeal, viz:

1. Declaration.
2. Plea of defendant.
3. Joinder of issue, notice of trial and note of issue.
4. Amendment to declaration (Minute entry May 14, 1931).
5. Plea to amended declaration.
6. Joinder of issue on plea to amended declaration.
7. Minute entry May 25, 1931.
8. Minute entries of trial.
9. Verdict of the Jury.
10. Motion of defendant for a new trial.
11. Memo. Motion for a new trial overruled.
12. Judgment of the Court.
13. Memorandum of notation of appeal by defendant.
14. Memorandum of filing and submission of Bill of Exceptions.
15. Bill of Exceptions.
- 24 16. Assignment of Errors with memorandum of date of filing.

17. This designation of Record.

WILLIAM W. BRIDE,
W.,

Corporation Counsel, D. C.;

THOMAS F. CAMERON,

Assistant Corporation Counsel, D. C.,

Attorneys for Appellant, District of Columbia.

Service of a copy of the foregoing Designation of Record acknowledged this 19th day of June, 1931.

A. L. NEWMYER,

Attorney for Appellee.

M.

Memorandum.

September 9, 1931.—Bill of Exceptions (in duplicate) submitted.

25 *Order Extending Time to File Transcript of Record.*

Filed October 2, 1931.

Court of Appeals of the District of Columbia, April Term,
1931.

Nos. 1836 and 1837, Original.

Law. No. 76152.

DISTRICT OF COLUMBIA, Petitioner,

VS.

FRANK GLADSON LEYS,

and Law. No. 76256.

DISTRICT OF COLUMBIA, Petitioner,

VS.

ROBERT H. LEYS.

On consideration of the petition to extend the time for filing the record in the above entitled causes in this Court until and including October 10, 1931, It is ordered by the

Court that said petition be and it is hereby granted and the time extended as prayed.

Per MR. CHIEF JUSTICE MARTIN,
September 18, 1931.

A true copy. Test:

[SEAL]. HENRY W. HODGES,
Clerk Court of Appeals, D. C.

26 *Order Extending Time to File Transcript of Record.*

Filed October 12, 1931.

Court of Appeals of the District of Columbia, October
Term, 1931.

Nos. 1836 and 1837, Original.

Law. No. 76152.

DISTRICT OF COLUMBIA, Petitioner,

v.

FRANK GLADSON LEYS.

Law. No. 76256.

DISTRICT OF COLUMBIA, Petitioner,

v.

ROBERT H. LEYS.

On consideration of the petition for a further extension of time to and including October 31, 1931, within which to file the transcript of record in the above entitled causes in this Court, It is by the Court this day ordered that said petition be and the same is hereby granted and the time extended as prayed.

Per MR. CHIEF JUSTICE MARTIN,
October 10, 1931.

A true copy. Test:

[SEAL.] HENRY W. HODGES,
*Clerk of the Court of Appeals
of the District of Columbia,*

By MONCURE BURKE,
Deputy Clerk.

27 Supreme Court of the District of Columbia.

Wednesday, October 21, 1931.

Sessions resumed pursuant to adjournments, Hon. Chief Justice Alfred A. Wheat, Jennings Bailey, Peyton Gordon, Jesse C. Adkins, James M. Proctor, Justices, presiding.

* * * * *

As of Oct. 20.

The Bill of Exceptions taken at the trial of this cause and heretofore submitted to the court and this day signed, is made a part of the record, nunc pro tunc.

28 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 27, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 76152 at Law, wherein Frank Gladson Leys is Plaintiff and District of Columbia, a Municipal Corporation, is Defendant and cause No. 76256 at Law, wherein Robert H. Leys is Plaintiff and District of Columbia, a Municipal Corporation, is Defendant, as the same remain upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of October, 1931.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

29 Court of Appeals, District of Columbia. Filed Oct.
30, 1931. Henry W. Hodges, Clerk.

In the Supreme Court of the District of Columbia.

No. 76152.

Mrs. FRANK GLADSON LEYS, Plaintiff,

v.

DISTRICT OF COLUMBIA, a Municipal Corporation, Defendant.

Bill of Exceptions.

Filed Sep. 10, 1931.

Be it remembered that at the trial of the case before Mr. Justice Proctor and a jury, duly empaneled and sworn, to try the issues herein, which trial began on May 25, 1931, and thereafter was further proceeded with, the hereafter recited proceedings were had and evidence given or offered, all before the jury retired to consider its verdict.

Thereupon on motion of counsel for plaintiff the matter of Robert H. Leys v. District of Columbia, Law No. 76,256, was consolidated with the matter of Frank Gladson Leys v. District of Columbia, Law, No. 76,152.

Thereupon **Dr. F. Watson Moffett**, *who* being first duly sworn, testified on direct examination, in substance, as follows:

That he is a practicing physician in the District of Columbia, and has been for twenty-four years; that he resides at 1635 Harvard Street, Northwest, and maintains an office at 127 B Street, Southeast, and has so maintained his office at said street and address for twenty-four years; that he recalled the condition of the sidewalk in front of 107 B Street, Southeast, during the month of January, 1926; that during said month he had occasion to meet Robert H. and Frank Gladson Leys; that he first met them on January 17, when Frank Gladson Leys was brought to his office by her husband, Robert H. Leys for treatment, and if I am not mistaken, I am not sure about this, by another man; that

30 he made an examination of Frank Gladson Leys
and found her condition to be: a cut on her forehead,
rather a contusion, not a cut requiring suture or
stitch; her mouth was bloody, her lip was cut, and some
teeth were loose; she complained that her right hand pained

her terribly, and her right knee and right ankle were bruised; that he redressed the wound on her forehead, and gave her a mouth wash for her mouth; that he gave her hot applications for her hand, and thereafter on three successive days he attended her; then I believe she went to New York; that during this time she suffered quite a little pain, practically all over; she had sustained quite a shake up, and she complained particularly of her hand, knee and ankle; that she had what is known as exostosis, that is, a little overgrowth of bone in this particular bone right here (indicating) right along about in here (indicating). It is evidenced by a red spot and some swelling at times. It is very painful, very painful to touch it. And the condition he has described to the jury is a condition that existed at the time of the last examination. Now, this is probably due either to an injury or due to a slight fracture of this bone, breaking the bone, or possibly only the breaking of the periosteum. That is a little fine covering of the bone which is about the consistency of a heavy sheet of paper, that covers every bone. That may be injured in a case like this one. That presses on the nerves, and the nerve ends. That causes pain. Sometimes it causes very severe pain. She complains of that. She still complains of the knee, and the knee, so far as I can see, is probably just simply due to probably favoring and probably having had it immobilized for so long, and not using it, as she normally would use it. The injury to the hand is of a painful nature, in that at her age, I believe that she is seventy-five—at her age it precludes any idea of doing much operation there, an operation in my opinion would probably be of doubtful value. Because of the injury to that hand, she is precluded from using it even to the extent of making it difficult for her to dress. That he saw Frank Gladson Leys several times after his first examination and did not see her again until about one week before the trial of this case.

31 At that time he made a little examination of her hand. He just looked at the hand. She would not let him touch it. And the condition is as described to the jury is a condition that existed at the time of the last examination. The witness further testified that in January 1926 the condition of the surface of the sidewalk in front of 107 B Street, Southeast, was familiar to him as for a number of years he had been going over it at least once

a day when he ate his lunch at the corner lunch room or at Cornell's lunch room, 109 B Street, Southeast. In 1926 there was a lunch room at the corner, and next to that was a combination gasoline station and automobile accessory store, and next to that, 107 B Street, Southeast, was a fruit stand. A frame fruit stand, a temporary building that had been there for a number of years, and next to that was Cornell's, 109 B Street, Southeast; that in January 1926 at the time the accident occurred the surface of the sidewalk in front of 107 B Street, Southeast, consisted as follows: A little less than half of the sidewalk adjoining the building was paved with brick; the rest of it was paved with square paving blocks of a some sand of a composition described by the witness as some kind of asphaltum composition; that the sidewalk in front of premises 109 B Street Southeast was comparatively newly paved with cement. A building for Cornell's lunch room, 109 B Street, had been erected some two years prior to January 1926, and at the same time the cement sidewalk in front of 109 B Street had been put down; that the brick portion of the sidewalk in front of premises 107 B Street had been down there for forty-one years; that to his knowledge the brick part of the sidewalk in front of 107 B Street had not been repaved at any time prior to the accident; that the day after he had treated Frank Gladson Leys he had occasion to look at the brick portion of the sidewalk in front of 107 B Street. The pavement was, the bricks had been worn just simply from natural traffic over them for a period of years; some of the bricks were worn to less than, worn to half the original thickness; the bricks were evidently of an old vintage because there were pebbles that had not
32 worn off, making rough places in the brick, that is where it had worn away; evidently they were the stones that had been left in the clay when the bricks were made. Some of the bricks were cracked in two. The surface level of part of the brick sidewalk was very uneven, there were certain uneven surfaces there. I could not specifically point out the exact location of any one at the present time.

“Q. And state whether or not you observed any particular place on that brick sidewalk in front of 107 and toward the party line or party wall between 107 and 109, any par-

ticular spot there with respect to the depression of the bricks? A. I have already stated that there were certain uneven surfaces there. I could not specifically point out the exact location of any one at the present time.

By Mr. Newmyer:

Q. To what extent was the surface uneven where the bricks were broken, as you described, and worn? How far below the surface level of the rest of the sidewalk was that depression? A. The normal brick is about two inches—I believe it is at least an inch, it is my opinion that there is at least an inch difference in the contour of the brick.

Q. Now, where the brick had been worn in the ways you have described, and some brick had been cracked, what was the condition of the surface of that walk with respect to persons walking on it? Was it even or not? A. It was uneven and the bricks were loose in spots.

33 Q. And you mean by 'loose in spots' that a person treading on a loose brick, the brick had a space on either side of it and would turn one way or another?

Mr. Cameron: I object.

The Witness: Yes.

Mr. Cameron: I object.

The Court: I think you had better try to avoid leading questions, Mr. Newmyer.

Mr. Newmyer: All right, I will do that, Your Honor.

By Mr. Newmyer:

Q. Now, Doctor, how long had the condition of that brick sidewalk in front of 107 B Street, which you observed around January, 1926, how long had that sidewalk remained in that condition that you have described to the jury before this accident, before January 17, 1926? A. I cannot make any definite statement as to the length of time. I would say it had been in bad condition for a number of years.

Mr. Cameron: I object to that, if your Honor please, that is a pure conclusion on the part of the witness, whether or not it was in a bad condition. He don't know.

By Mr. Newmyer:

Q. Had it been in the condition you have described for a number of years? A. It had.

34 Q. Do you recall at any time during the period of your residence there before the accident, from the time that sidewalk was originally laid and up to the time of the accident, do you recall that any repairs were ever made on that brick sidewalk? A. I do not.

Mr. Cameron: I object.

The Court: The objection is overruled.

Mr. Cameron: And may I have an exception?

The Court: Yes.

Mrs. Leys suffered quite a little bit of nervous shock following the accident; and the pain that she has suffered, particularly to her hand has caused a great deal of sleeplessness and has induced a nervous condition.

On cross examination the witness testified that he is forty-eight years old and came to Washington when he was seven years of age and moved into 127 B Street Southeast with his parents and it was his home for the past forty years until a year ago last September, except when he was at school, at the hospital, and in the army. That Mrs. Leys is suffering from an exostosis of the fourth metacarpal bone; that so far as he knows she had no exostosis before the accident. That he attended for three consecutive days at her home after the 17th of January, 1926, after which she went to New York and got out of his hands, and he did not treat her after that. And he saw her again several months afterwards when she came to his office and at that time he discovered she had the exostosis.

Q. How did you determine that she had an exostosis at that time? A. She had a red place which I think now is apparent on her hand in that particular spot; it was very sensitive and, at that time, I could feel a little rise
35 in the surface of the bone, there."

This was several months after the accident. He did not determine whether she had had any injury between January 17, and the time he saw her; the condition of her hand possibly could be due to another injury. However, having seen it and noted the injury to the hand, naturally he sup-

posed it was the original injury which caused it. It might have been due to another injury.

Q. You did not inquire of Mrs. Leys whether or not she had any injury? A. I do not think and I did not think it was necessary. I did not inquire. The injury she received was sufficient to cause this condition."

Whereupon counsel for defendant moved that the answer be stricken out as not responsive to the question. Motion overruled, exception noted and allowed.

"Q. Now, Doctor, is there any difference between an exostosis and a callous? A. Yes, there is a difference.

Q. Will you give us the difference, if you will? A. A callous is usually referred to as a skin hardening, a hardening of the skin, an overgrowth of the epidermis, tissue; a surface condition. An exostosis deals entirely with bone, a bony condition.

Q. Doctor, could an exostosis occur if there were not a fracture? A. I beg your pardon?

Q. I say, could this condition that you have described occur without a fracture of the bone? A. I explained
36 that it may be due to an injury to the periosteum, a little fibarous thin, paper-like covering over the bone.

Q. You could not tell that without an X-ray, could you? A. Yes, you could tell it without an X-ray. You could feel it lots of times.

Q. On the 17th of January, when this lady was brought to your office, you could not tell it at that time without an X-ray? A. No, her hand had just been injured. I could not tell anything about it. It was not there then. This is an outgrowth of that."

It is painful in the location where it has developed on Mrs. Leys. It would make writing or playing a musical instrument painful, and this condition could occur in a young person as readily as in an old person. I did not deem it advisable for a woman of her age to undergo an operation.

"Q. Doctor, this condition could not have been brought about by the chemical changes of the body ordinarily connected with a person of the age of Mrs. Leys? A. A condition of exostosis?

Q. Yes. A. We have a condition somewhat akin to that that comes in all old age, but in all joints; as a matter of fact, this exostosis is not a joint condition, with Mrs. Leys.

Q. But, you say it could come in all old ages? A. 37 In the joints; in joints.

Q. In all old persons? A. Only in the joints."

That he has lived in that locality for approximately forty years with the exceptions noted, and is well acquainted with conditions there and buildings and tenants in that locality in 1926. That in front of premises 107 the sidewalk was composed partly of brick and partly of asphalt.

"Q. Was it in ordinarily good repair? It was, was it not? A. No, I would not call it in good repair."

The bricks were defective and that a number were worn to only one-half of their original thickness; that some were cracked in two. I could see that the bricks were worn because there were pebbles in there, good sized stones in there; the original brick had been worn around those pebbles. The stone being harder than the brick it wore around them.

"Q. Doctor, did you ever take any of the bricks out of the walk and determine whether or not they had been worn down to half their size or half the original size? A. It was not necessary to take them out. You could see them.

Q. Is it not possible these pebbles may have been on top or at the face of the brick when it was originally made? Is that possible? A. It is highly improbable."

That there were a number of places in front of 107 B Street on the brick portion of the sidewalk that were defective, but that he could not tell exactly where they were located; that the bricks composing the sidewalk were worn, cracked and loose, but that he did not try to dislodge any of them; he

38 had not observed any bricks worn or pushed out by reason of people walking over them; the witness further illustrated on the black board as to the number and location of the uneven places in the sidewalk, four of such places, placing them at intervals on the sketch drawn on said board; that the size of the bricks were two inches thick, four inches wide, and eight inches long.

Thereupon the plaintiffs, in order further to maintain the issues on their part joined, called as a witness **John F. Ford**,

who, being first duly sworn, testified, upon direct examination, in substance, as follows:

That he is employed at Cornell's Lunch Room, 109 B Street, Southeast, and has been so employed since May of 1925, as counterman; that he recalled the condition of the sidewalk of 107 B Street in January of 1926; that the same was constructed partly of brick, and partly of blocks; that the brick extended from the building line toward the curb about half way to the center of the sidewalk where the block paving began and extended to the curb; that the brick part was very uneven, some of the bricks were sunken in a lot of places; that he never paid any particular attention to it walking over it except while walking off of the pavement, then he noticed it was very rough and uneven; that at a point on the sidewalk in front of 107 B Street, and near the dividing line of 109 there was a cave-in; one place was lower than the other, it was a space something like two feet; that he could not tell whether the bricks at the bottom of the vace-inwere firm or loose; that the depression was the width of six or eight bricks, and the depression was three or four inches lower than the rest of the

surface of the sidewalk. That the first time he
39 noticed this condition was some time in 1925, shortly after he went to work there, and it was in the same condition in January 1926; the brick sidewalk in front of 107 B Street, so far as he knew, had not been repaired at any time from the time he went to work there in 1925 until after the accident in January 1926. That he never paid particular attention to it and never inspected it; that he did not know Mr. or Mrs. Leys at any time before the accident except that he had served them meals in the lunch room previously and knew them as occasional customers.

Upon cross-examination, the witness testified that he generally passed 107 B Street on his way to work; that some of the bricks were caved-in in front of 107 B Street; that the sidewalk was very uneven, some bricks seemed to be better than others in walking over them; that there were several such low places; that he had never noticed any bricks being out, or any holes in the sidewalk or any broken or cracked bricks; that the depression in front of 107 B Street near the dividing line of premises 109 B Street was two feet in circumference and was from three to four inches deep; that the depression was not caused by the re-

moval of any bricks; that he had never seen any bricks removed. Thereupon the witness drew on the black board the location of the depression; locating it at a point at the junction of the brick portion of the sidewalk with the asphalt block portion of the sidewalk, and in front of premises 107 B Street on and contiguous to the dividing line between premises 107 and 109 B Street; that he first noticed the condition of the sidewalk in the summer of 1925.

Upon redirect examination, the witness testified that he had never paid particular attention to the condition of the bricks in the sidewalk in front of 107 B Street, and that he had never noticed any broken or loose bricks; but had noticed that in this place they were lower than others.

Thereupon the plaintiffs, in order further to maintain the issues on their part joined, called **Robert H. Leys**,
40 who, being first duly sworn, testified upon direct examination, in substance, as follows:

That he is a resident of Whitestone, Long Island, New York; that he is the husband of Mrs. Frank Gladson Leys; that in January 1926 he and Mrs. Leys were in Washington; that in January 1926 he and Mrs. Leys lived at 222 A Street, Southeast; that on January 17, 1926, he and Mrs. Leys had occasion to walk along B Street, Southeast; that Mrs. Leys was an accomplished organist and on that afternoon had played at the Church of the Epiphany; we had taken the street car to First Street and B Street, Southeast, and walked across the sidewalk to the House Office Building and across First Street along B Street on the south side of B Street about six thirty o'clock. It was a dark, a pretty dark night, you could not see your hand before your face. My wife was on my right side; that there were no lights, it was not as it is today with all electric lights and stores. Whereupon counsel for the plaintiffs propounded the following question:

“Q. Now, how far had you gone along B Street before something happened, and just tell the Court and the jury what did happen. A. Not quite as far as Cornell’s. When I crossed Cornell’s building line, or I was just coming to it at the time, I do not know—I did not measure it—but my wife suddenly fell; it was not slippery. It had been sleeting. It had been raining, but the sidewalk was perfectly clear from ice, there was no ice at all, there was nothing

slippery about it when she fell down like that, and I immediately jumped down and put my hand along her foot in a hole, and in that hole there was about half a brick that was loose, and I pulled it out, and then I lifted her up, and my hand was all muddy, and I got it on my face too. I
41 picked her up and put her on my shoulder and ran with her to Dr. Moffett's office, she was bleeding. Her teeth were all broken, and she was moaning and crying.

That the condition of her hand got continuously worse. She has not had one solid night's rest since the accident and wakes me up with that pain continuously. She tries to do the best she can but she cannot play on the organ or use her hand as she did before."

That he looked at the piece of brick that he picked up that night and found it was about half a brick; that the hole was of a size, indicating by putting his hands together in an oval shape probably about half the size of his head; that when he reached down her foot was across the hole and he pulled the part of brick from under her foot; and that the depth thereof was about three-quarters of his hand; that he had never noticed that place in the sidewalk before; that Dr. Moffett treated his wife, Frank Gladson Leys, for several days; that when she was able she went back to New York and has been under Dr. Burns and Dr. Peer; that Dr. Peer of Flushing, New York, began to attend her immediately after she went back to New York. That Dr. Burns, of Seacliff, Long Island, New York, attended her sometimes when she was in Oyster Bay. That Dr. Peer and Dr. Burns treated Mrs. Leys only for the injury to her hand which resulted from this accident. I went to the Doctors with her. Dr. Peer's charges total \$250.00 and Dr. Burns' charge is \$500.00.

Thereupon witness was asked the following question:

"Q. Now have you received any bill from Dr. Peer for his attention and medical treatment of Mrs. Leys?"

Counsel for defendant objected for the reason that the mere showing of a bill does not indicate that the expenses set out therein were incurred by reason of the negligence of the defendant, and second, that the bill is not the best
42 evidence. Objection overruled and exception allowed.

Thereupon the witness testified that he had received a bill and the amount thereof was \$250.00 for five years' service.

Thereupon the witness was asked the following question:

“Q. Now, I will ask you with respect to Dr. Burns.”

Counsel for defendant objected for the reason that the mere showing of a bill does not indicate that the services therein set out were incurred by reason of the negligence of the defendant, and second, the bill is not the best evidence. Objection overruled and exception allowed. The witness was then shown a paper writing which he identified as the bill received from Dr. Burns for \$500.00, whereupon the two bills were offered in evidence, at which time counsel for defendant objected to their reception for the reason that the bills themselves were secondary evidence at best, the best evidence being the persons who rendered the bills, there being no showing made that the persons were not available, and second, the bills do not indicate that they were for services which were necessary as the result of the alleged negligence of the defendant, and third, there was nothing to indicate whether they were reasonable and fair. Objection overruled, and exception allowed. Whereupon the bills were received in evidence.

Upon cross examination the witness testified that the bills rendered by Dr. Peer and Dr. Burns had not been paid; that he could not tell whether Frank Gladson Leys fell in front of 107 or 109 B Street, because he did not know where the dividing line is.

“Q. Did you give the location? A. I never gave any location, except 107 B Street, Southeast.

Q. You only gave 107? A. Or 109, I do not know now whether—I do not know now where the dividing line is; I do not know anything about it.

Q. In your, Mr. Leys, in your second declaration,
43 or amended declaration, is it not a fact that you gave this Court the location at 109 B Street, Southeast?

A. I do not know now, and I am not positive whether it is 107 or 109, but I believe it is 107. It originated from me, the number, and all I know is what I saw on the building. I cannot swear whether it was 107 or 109.

Q. Now, Mr. Leys, you do not know whether your wife fell—— A. What is that?

Q. As a matter of fact, you do not know whether your wife—— A. I do not know?

Q. Just a minute. A. I can take you out and show you the spot, if you want to go now, and you will see that it is 107, that is right, up there, on the one part of the building, and 109 is on the other one, and where the dividing line is between them, I do not know, where the dividing line is. I did not measure it.

Q. Now can you tell the Court and jury, whether your wife fell in front of the fruit stand, or in front of Cornell's lunch room, where your wife fell? A. I have answered that before, and told you that I do not know where the dividing line is between 107 and 109, and how can I tell you, or how can I swear to something I do not know? It
44 was one of the two spots."

Whereupon the following question was propounded by counsel for the defendant; the witness testified:

"Q. Do you know whether she fell in front of 107 or 109? A. May I answer that in my own way, if the Judge will permit me?

The Court: Yes.

A. When I am standing northwest from the west end entrance door of Cornell's Lunch Room, that is in a south-east direction from my position, when I stand over there, that is the best I can answer that.

Mr. Cameron: Then that——

Mr. Leys, interposing: "and if you were in front of 107, but as I told you before, I do not know where the dividing line is there; I cannot tell you whether it is 107 or 109, I gave all of the information about that, and that is the origin of the information."

That he did not pay any attention as to how close he was to Cornell's when Frank Gladson Leys fell; that the accident happened between six and seven o'clock; that there were some dim lights on the streets; that they were very indistinct; that it was very dark; that we were on our way to Cornell's for supper. I did not get to Cornell's, I got to the hole; that he did not pay attention as to how close

they were to Cornell's; that he had passed along B Street between First and Second Streets many times while going to Cornell's Restaurant.

Thereupon the plaintiff, **Frank Gladson Leys**, in order to maintain the issues on her part joined, being first
45 duly sworn, testified on her own behalf on direct examination in substance as follows:

That she is the wife of Robert H. Leys; that she lives at Whitestone, Long Island, New York; that on Sunday, January 17, 1926, when in company with Robert H. Leys she was in Washington and went downtown; and sometime after six o'clock, returned to the vicinity of 1st and B Streets, Southeast; that on reaching First and B Streets they went over to the Office Building, crossed First Street and were going to Cornell's for their dinner; that as they were walking along B Street, it had been raining slightly and was muddy but not slippery; that she was not looking down to see where she was going; just walking along; that the first thing she knew she fell flat—right straight out flat—and struck her face, her lip was cut and her hand badly bruised and hurt; that she was bruised about her forehead and chin, her knee and ankle, and all of one side; that her husband picked her up and carried her to Dr. Moffett's office, and after treatment there took her home in a taxicab. That she was confined to her bed for three whole days; that she was not able to go out for about three weeks; that she was nervous, sore and lame all over; that her hand hurt so dreadfully. I could not sleep with it and I never had a whole eight hours sleep any night since this happened because it pains me so intensely sometimes that it is unbearable; that she never had any trouble with her hand or injury to her hand or wrist before or since this happened, and had always been very active and was an accomplished organist and musician. I cannot press down those fingers at all because the pain was dreadful; it feels like wires are going through it up to my elbow; that she cannot use the hand in dressing and attending to ordinary affairs. Sometimes it seems a little better, but there is no permanency.

Counsel for plaintiffs propounded the following question to her:

Q. Mrs. Leys, did you have any opportunity to observe the place that you fell on the night of the accident, the night the accident happened, or at any time after
46 that? A. I think one day when I was walking by there, going across there, I said 'now where was it I fell', I said that to Mr. Leys, and he says——

Q. Don't tell us what he said. A. Well it was along there somewhere; I can't tell you the exact location, it would be impossible, I could not. My foot caught—I don't know whether it was in a brick that was partly out, but it was lower than the other part of the sidewalk, anyway I caught my foot or toe or something, and it threw me."

That when she left Washington about three weeks after the accident she returned to Whitestone; that she was attended by Dr. Peer; that the frequency of his visits was generally once in three or four days and sometimes once in two days, according to the pain; that the course of treatment provided was the use of violet ray, and something put on her hand; that during the year of 1926 she saw him not less than three weeks between visits, and that thereafter he treated her continuously whenever the pain was such that attention was needed when I was in Flushing and when not there she was in Seacliff; that she was attended by Dr. William Burns at Seacliff about two months after the accident; that he examined her hand, ankle and knee.

"Q. And, how soon after this accident did you see Dr. Burns at Seacliff? A. I think it was about two months after the accident I saw him. We went over there to see him.

Q. And state whether or not he had treated you?
47 A. Yes.

Q. And—— A. And he examined my hand, my ankle, also my knee.

Q. Now, from that time on up to the time you came back to Washington, this last time, when you were in Seacliff state whether or not Dr. Burns attended you? A. Yes.

That on the occasion of visits to Washington every
48 winter she was treated by Dr. Moffett.

Whereupon counsel for the plaintiffs announced that he rested.

Thereupon counsel for the defendant moved to strike all of the testimony with respect to the bills for medical services rendered the plaintiff, Frank Gladson Leys, for the reason that they were, first, not shown to be reasonable; and second that they were not properly admitted in evidence in that they were not the best evidence since the persons tendering the bills were not presented to the Court for the purpose of testifying thereto. The Court overruled this motion. Exception noted and granted.

Thereupon counsel for the defendant moved for a directed verdict upon the following grounds:

1st. That the plaintiff had failed to make out a case in that the declaration alleged that the accident was due to loose bricks so as to cause a hole in front of 107 B Street, and that the testimony failed to connect any depression with the injury to the plaintiff, Frank Gladson Leys.

2nd. That the plaintiff had failed to prove either actual or constructive notice against the defendant with a depression which was proximate cause of plaintiff's injury.

3rd. That the accident happened more than three years prior to the date of the filing of the second amended declaration.

Whereupon, after argument, the Court overruled the motions.

Counsel for the defendant noted an exception.

Thereupon the defendant, the District of Columbia, in order to maintain the issues on its part joined, called as its first witness **Harry Higham**, who was first duly sworn, and testified, in substance, as follows:

That he conducts a business at 105 and in the rear of 107 B Street, Southeast, and has been in business at that address for something over thirty years; that he was acquainted with the condition of the sidewalk in front of 107 B Street, Southeast; that the said sidewalk in January of 1926 was constructed part of brick to half the distance to

49 the curb and part of square blocks; that he had occasion to observe the condition of the sidewalk during January 1926 and that the same was to the best of his belief in good condition; that he had occasion to pass over the walk several times a day going back and forth to his place of business carrying gasoline which was served to customers at the curb; that he did not observe to

his recollection any low place or places on the building line between 107 and 109 B Street; that he did not observe any low place approximately four inches deep.

Whereupon, on cross examination, the witness testified that he was first asked to be a witness about a year ago, sometime in 1930; that the only reasons he had for observing the condition of the sidewalk in 1926 were such as the man walking across a sidewalk, seeing a defect there would be apt to have it called to his attention forceably and the only other fact that having walked across the sidewalk a number of times and not having stumbled himself or observed any bad places; that in the spring of 1926 the brick sidewalk in front of 107 B Street was removed and was replaced by a cement sidewalk similar to that existing in front of 109 B Street in 1926.

Thereupon the defendant, in order further to maintain the issues on its part joined, called as a witness **George B. Bryan**, who, being first duly sworn, testified upon direct examination, in substance, as follows:

That in January 1926 he was engaged in the restaurant business at 101 B Street, Southeast, and that he was the owner of premises 107 B Street, Southeast; that in January 1926 he passed over the sidewalk every day; that he did not observe any depression in the brick walk other than what the ordinary brick walk shows; that he did not observe any low places in the walk or a low place approximately two feet in circumference and four inches deep; that he did not observe any broken or loosened bricks or that any of them were displaced.

Upon cross examination the witness testified that he was first requested to be a witness and first heard of the case on Friday or Saturday, that he had no particular
50 reason to recollect how the bricks in the sidewalk were in 1926 until last Friday or Saturday and is simply depending on his present recollection, that he owned 107 B Street from 1912 to 1926; that he did not know of any repairs being made to the brick sidewalk during that period; that witness had no occasion to make any inspection of the brick sidewalk; that in 1926 he was the owner of premises 107 B Street and had owned them for approximately ten years; that he had observed the block since 1912; that between 1912 and up to 1926 he did not remember any

Thereupon counsel for the defendant moved to strike all of the testimony with respect to the bills for medical services rendered the plaintiff, Frank Gladson Leys, for the reason that they were, first, not shown to be reasonable; and second that they were not properly admitted in evidence in that they were not the best evidence since the persons tendering the bills were not presented to the Court for the purpose of testifying thereto. The Court overruled this motion. Exception noted and granted.

Thereupon counsel for the defendant moved for a directed verdict upon the following grounds:

1st. That the plaintiff had failed to make out a case in that the declaration alleged that the accident was due to loose bricks so as to cause a hole in front of 107 B Street, and that the testimony failed to connect any depression with the injury to the plaintiff, Frank Gladson Leys.

2nd. That the plaintiff had failed to prove either actual or constructive notice against the defendant with a depression which was proximate cause of plaintiff's injury.

3rd. That the accident happened more than three years prior to the date of the filing of the second amended declaration.

Whereupon, after argument, the Court overruled the motions.

Counsel for the defendant noted an exception.

Thereupon the defendant, the District of Columbia, in order to maintain the issues on its part joined, called as its first witness **Harry Higham**, who was first duly sworn, and testified, in substance, as follows:

That he conducts a business at 105 and in the rear of 107 B Street, Southeast, and has been in business at that address for something over thirty years; that he was acquainted with the condition of the sidewalk in front of 107 B Street, Southeast; that the said sidewalk in January of 1926 was constructed part of brick to half the distance to

49 the curb and part of square blocks; that he had occasion to observe the condition of the sidewalk during January 1926 and that the same was to the best of his belief in good condition; that he had occasion to pass over the walk several times a day going back and forth to his place of business carrying gasoline which was served to customers at the curb; that he did not observe to

his recollection any low place or places on the building line between 107 and 109 B Street; that he did not observe any low place approximately four inches deep.

Whereupon, on cross examination, the witness testified that he was first asked to be a witness about a year ago, sometime in 1930; that the only reasons he had for observing the condition of the sidewalk in 1926 were such as the man walking across a sidewalk, seeing a defect there would be apt to have it called to his attention forceably and the only other fact that having walked across the sidewalk a number of times and not having stumbled himself or observed any bad places; that in the spring of 1926 the brick sidewalk in front of 107 B Street was removed and was replaced by a cement sidewalk similar to that existing in front of 109 B Street in 1926.

Thereupon the defendant, in order further to maintain the issues on its part joined, called as a witness **George B. Bryan**, who, being first duly sworn, testified upon direct examination, in substance, as follows:

That in January 1926 he was engaged in the restaurant business at 101 B Street, Southeast, and that he was the owner of premises 107 B Street, Southeast; that in January 1926 he passed over the sidewalk every day; that he did not observe any depression in the brick walk other than what the ordinary brick walk shows; that he did not observe any low places in the walk or a low place approximately two feet in circumference and four inches deep; that he did not observe any broken or loosened bricks or that any of them were displaced.

Upon cross examination the witness testified that he was first requested to be a witness and first heard of the case on Friday or Saturday, that he had no particular
50 reason to recollect how the bricks in the sidewalk were in 1926 until last Friday or Saturday and is simply depending on his present recollection, that he owned 107 B Street from 1912 to 1926; that he did not know of any repairs being made to the brick sidewalk during that period; that witness had no occasion to make any inspection of the brick sidewalk; that in 1926 he was the owner of premises 107 B Street and had owned them for approximately ten years; that he had observed the block since 1912; that between 1912 and up to 1926 he did not remember any

repairs being made to the brick sidewalk; that the brick sidewalk was replaced by cement in 1927.

Upon redirect examination the witness testified that the condition of the brick sidewalk when he saw it, after it was taken up, looked like it was good for another hundred years.

Whereupon the defendant, in order to further maintain the issues on its part joined, called as a witness **Virgil S. Bryan**, who, being first duly sworn, testified, on direct examination, in substance, as follows:

That he is in the lunch-room business, being located at 1st and B Streets, Southeast, and has been so located for a period of about ten years; that he is acquainted with premises 107 B Street; that the sidewalk thereon is now paved with concrete, but that in 1926 it was brick to about midway thereof; that he had occasion to pass over the center of this sidewalk in January of 1926 practically every day; that he did not observe any low place or places or depressions or that there were any bricks loose in that part of the sidewalk, nothing more than there generally were; that he did not observe, at any time, a low place approximately two feet in circumference and four inches deep in front of premises 107, and abutting the property line of 109 B Street.

Whereupon on cross examination he testified that the fact that he did not observe the depressions did not mean that they were not there.

Thereupon the defendant, in order further to maintain the issues on its part joined, called as its next witness **Howard Venable**, who, being duly sworn, testified upon direct examination, in substance, as follows:

51 That he is a member of the Metropolitan Police Department, attached to No. 5 Precinct; that he has been a police officer for six years in that precinct, and that he was generally assigned to patrol No. 1 beat; that the said beat included B Street, between First and Second Streets, Southeast; that he was acquainted with premises 107 B Street, Southeast; that in 1926 the sidewalk in front of said premises was constructed partly of brick and partly of square blocks; that while patrolling that street he had occasion to observe the condition of the brick walk; that he never observed anything out of the ordinary there; the

brick seemed to be in pretty good condition; that he did not observe any holes or loose bricks or a low depression approximately two feet in circumference, and four inches deep in front of premises 107 B Street; that he had never received any report of an injury in front of 107 B Street.

Upon cross examination the witness testified that he never made any inspection of that brick sidewalk, that he was first asked to be a witness in this case on May 14, 1931, and had never heard of it before and was then asked to tell what his recollection was about the condition of the brick sidewalk in 1926; that he was assigned to patrol that area during the first year he was a police officer; that he knew it was his duty to report defects in said sidewalk; that he had never made such a report because he had not observed anything to report.

Whereupon the defendant, in order to further maintain the issues on its part joined, called as its next witness **J. R. Harris**, who, being duly sworn, testified, upon direct examination, in substance, as follows:

That he is a police officer now assigned to No. 14 Precinct; that in January of 1926 he was assigned to No. 5 Precinct; that while so assigned to No. 5 Precinct he patrolled No. 1 beat; that No. 1 beat included B Street between First and Second Streets, Southeast; that he was acquainted with 107 B Street; that the sidewalk abutting said premises in January of 1926 was paved partly with asphalt paving blocks and partly with red brick; that the red brick was located in the sidewalk between the center thereof and the front building line of premises 107 B Street;

52 that many times while on his tour of duty he had occasion to pass over the brick sidewalk; that he observed the condition thereof; that he had never observed a low place approximately two feet in circumference and about four inches deep; that he had never observed any broken or loose bricks or any holes caused by the displacement of bricks:

“Q. Can you tell the Court and the jury how the sidewalk abutting that fruit stand was improved, in January, 1926? A. The sidewalk was this asphalt paving block, and red brick.

Q. And where was the red brick located? A. That was near the building line.

Q. Near the building line. A. Yes; up what might be called the parking.

Q. You mean by the building line, you mean the front building line? A. To the building line, yes sir; right up to the building.

Q. You had occasion to observe the condition of the sidewalk? A. Yes sir.

Q. Did you at any time observe a low place approximately two feet in circumference and about four inches deep? A. Never, according to my knowledge; no sir.

Q. Did you at any time observe any broken brick, or loose brick, or did you observe any holes caused by the misplacement of brick? A. No sir; not at that particular place."

Witness further testified that no one ever reported to him the happening of an accident in front of 107 B Street; that he was first asked to be a witness on Wednesday of last week.

Upon cross examination the witness testified that according to his memory there were no depressions in the
53 sidewalk, and that had there been any there he would have observed them.

"Q. And did you know that a lady had fallen there? A. No, sir; I did not.

Q. Never even heard of that? A. Never heard of that.

Q. And never made any report on the incidental book of any defect in that street? A. Not at that particular place that I can recall.

Q. That brick walk had been there, from its appearance, for many, many years, had it not? A. Yes, sir.

Q. And do you mean that it was an even surface and no depressions? A. No more than any ordinary walk, where people are walking on it wear it down.

Q. And when the brick wore down, they leave depressions don't they? A. Oh, yes."

The Court: I suppose that the jury knows that, as much about that, as the witness, Mr. Newmyer.

Thereupon the defendant, in order to further maintain the issues on its part joined, called **Wilford P. Als**, who, being duly sworn, testified, upon direct examination, in substance, as follows:

That he is acquainted with premises 107 B Street, Southeast, and became so acquainted through daily visits to premises 105 B Street, Southeast; that the sidewalk abutting premises 107 B Street, Southeast, in January 1926, was constructed of red brick from the front building line of said premises to the center of the sidewalk; that from that point on it was constructed of paving blocks; that he had occasion to pass over the sidewalk in front of 107 B Street; that he did not observe any low places or depressions or loose or broken bricks in front of said premises;

54 that he did not observe a depression or low place approximately two feet in circumference and four inches deep in front of premises 107 and abutting the building line of 109; that had he observed such a condition he would have made a formal report thereof.

Upon cross examination the witness testified that it was his duty to report any defects in the street that were observed by him; that he did not observe any defects in front of premises 107 B St.; that his first knowledge that an accident had occurred in 1926 in front of premises 107 B Street and the first time he was brought into this case was on the day before he appeared in Court to testify in this cause.

Thereupon the defendant, in order to maintain further the issues on its part joined, called **J. B. Powell**, who, having been first duly sworn, upon direct examination, testified as follows:

That he is in the contracting business and has been so engaged since 1900; that he is acquainted with premises 109 B Street, Southeast, and became so acquainted in February, 1923, when he entered into a contract for the erection of a store building at that address; that the front of the store was constructed with two projecting show windows and a door between them; that there was also a side door next to premises 107 B Street; thereupon the witness drew a sketch on the blackboard indicating the windows and doors; that the width of the building is approximately twenty feet; that the sidewalk in front of 109 B Street was constructed, under his direction, of cement.

Upon cross examination he testified that he did not touch the sidewalk in front of 107 B Street, but that where the cement joined with the brick and where there were any uneven places he was instructed by the Surface Depart-

ment to raise any low brick and bring them up in line so as to make them perfectly even on both sides.

Thereupon the defendant, in order to further maintain the issues on its part joined, called **Thomas E. Blasey**, who, being duly sworn, testified on direct examination, in substance, as follows:

That he is a member of the Metropolitan Police Department, assigned to the Traffic Bureau; that his post of duty for the past twelve or thirteen years has been located at 1st and B Streets, Southeast; that he is acquainted with premises 107 B Street, Southeast; that in January
55 of 1926 the sidewalk thereof was constructed partly of brick and partly of blocks; that the bricks extended over the center of the sidewalk to the front of the building; that he had occasion to pass over the brick sidewalk in January 1926 when he went to Cornell's lunch room; to the cigar store at 113 B Street, and to Mr. Higam's Bicycle Shop; that these occasions were frequent; that with respect to the sidewalk in front of 107 B Street he had never noticed anything out of the ordinary; that he did not see any depression or any low place or any broken or displaced bricks in front of 107 B Street; that no one had ever pointed out to him in his official capacity as a police officer that anyone had been injured in front of 107 B Street; that he did not recall observing a low place about two feet in circumference and about four inches deep in front of premises 107 B Street. Thereupon, on cross examination, the witness testified:

“Q. And you were asked the first time, two weeks ago, to remember about the condition in 1926? A. Yes, sir; yes.”

Thereupon the defendant, in order to further maintain the issues on its part joined, offered as a witness **Charles E. Cornell**, who, being first duly sworn, testified on direct examination, in substance, as follows:

That he is in the restaurant business located at 109 B Street, Southeast, and has been so located for eight years; that he has lived in that vicinity for approximately twenty-two years, being associated in business with his father at 113 B Street, Southeast; that in January of 1926 premises 107 B Street were improved by a one story frame building

wherein a cigar and fruit business was conducted; that the sidewalk in front of said premises in January 1926 was constructed half of asphalt block and the other half of red brick; that the red brick was located at the building line of said premises and extended to about halfway of the street; that he walked over the said brick sidewalk every day; that he did not observe any depression or any holes or any broken, loosened or displaced bricks; that he did not
56 know of any low place approximately two feet in circumference and four inches deep in front of 107 B Street; that the sidewalk in front of premises 109 B Street was constructed of cement, the walk being laid in 1923. Before the new concrete sidewalk was laid in front of 109 B Street in June, 1923, the sidewalk in front of 109 B Street was the same as in front of 107 B Street, namely, half brick to the center of the walk and asphalt blocks to the curb.

Whereupon the defendant, in order further to maintain the issues on its part joined, offered **John Michael Fox**, who testified on direct examination, in substance, as follows:

That in January of 1926 he was employed at Cornell's restaurant at 109 B Street, Southeast, in the capacity of bus-boy; that one of his duties was to sweep the sidewalk in front of said premises which was done nearly every day; that he knew the plaintiff, Frank Gladson Leys, and had first come to know her when she was injured; that the accident happened sometime in January, 1926; that he believed the day when the accident happened to have been a Sunday; that it was still light according to his recollection; that he was standing in the show window at Cornell's Restaurant which he identified to be the window near the dividing line of 107 and 109 B Street; that he saw something fall; that he did not know it was a lady; that he noticed a lady pass, but did not pay any particular attention to her.

"Q. Now, will you talk to the Court and jury, and tell them what it was that you saw? A. I saw something fall. I did not know that it was a lady. I noticed a lady pass, but I did not pay any particular attention to her, until something I had my attention attracted to something about in that direction (indicating). I went out there. I saw

that it was a lady that fell, and I went out there to help her up.

Q. Did you help her up? A. She scrambled to her feet, she was on her hands and feet, and I took her left arm and lifted her up.

57 Q. And what did she do? A. She scrambled around; she had her back towards our door. She turned around and says, 'I was going in there to get something to eat.' So I walked her over to the door, and right inside, and with that, I had not seen her husband, or Mr. Leys, before that, or nobody else around, but just as soon as I got her inside or was at the door, or at the table, there, where she sat down, Mr. Leys came. The lady said to me 'That is my husband', and that is the first recollection I have of meeting him.

Q. Mr. Fox, you helped Mrs. Leys to her feet? A. Yes sir.

Q. You took her into the restaurant? A. I took her right into the place: yes sir."

Witness further testified that when he helped her to her feet after the fall he looked at the sidewalk and that he did not see anything wrong with it that he knew of; that he was "most sure" that the accident happened in front of 109 B Street.

Upon cross examination the witness testified that by "most sure" he meant "positive".

"Q. What did you mean by saying 'most sure'? A. Well, positive.

Q. Why did you say that you were 'most sure', if you are positive? A. Well, it was only a line there, just like this (indicating) where the line would be.

Q. And didn't you say that you were most sure, because you did not remember, whether you picked her up off of the bricks or the cement? A. Oh, I remember picking her up off of the cement.

Q. You remembered it when? A. Sir.

Q. You remember it now? A. Yes sir."

58 that she fell while she was going toward First Street;

"She had just passed our front door when she fell, she was going from second toward first street, no one was with

her and I did not see Mr. Leys and when she fell she fell towards first street and I was the only one that helped her up."

That there might have been brick on the other side of the sidewalk; that the weather was dry, and everything was clear; that he did not recall that rain or sleet fell on that occasion; that it was light when the accident happened;

"that I ceased work at Cornell's later in 1926; that I was first asked about this accident about a year ago, which was about four years after the accident happened and my attention was not called to it until then when the claim agent for the District came to Capitol Heights, Maryland, where I was living to ask me about it."

Thereupon the defendant, in order further to maintain the issues on its part joined, offered **Joseph E. Butler**, who testified on direct examination, in substance, as follows:

That he is employed in the Electrical Department, Street Lighting Division, District of Columbia. The witness identified a plat showing lighting conditions on B Street between First and Second Streets, Southeast, as existed in 1926; that the markers appearing on the map indicated the existence of street lamps; that the particular symbol thereon appearing indicated incandescent lamps; that the particular lamps were spaced approximately seventy-five feet apart and contained a hundred candle lamp which should show a light circle that nearly reached the other reflection.

Upon cross examination the witness testified that he had nothing to do with the lighting of the lamps; that he could not testify when they were turned on; that they are put on at different hours depending on the time of the year and he could not tell at what time they were lighted on January 17,

1926, without consulting the tables; that the time
59 varies each day approximately two or three minutes according to the time when the sun sets; that the lamps were erected under the direction of the District of Columbia; that the original lamp is furnished by it; that thereafter the Potomac Electric Power Company is required to replace all broken lamps at their own expense; that the replacing of burned out lamps is taken care of by the Potomac Electric Power Company, who maintains a number of patrolmen covering the city each night to look out for and

replace the dead lamps; that his office did not have any record of replacements on B Street between First and Second Streets, for 1926.

Thereupon the defendant, in order further to maintain the issues on its part joined, offered **Willis Fillebrown**, who, being first duly sworn, testified on direct examination as follows:

That he is employed at Cornell's lunch room as counter man and has been so employed since September of 1925, that he was acquainted with the condition of the sidewalk in front of premises 107 B Street, Southeast, in January of 1926; that the sidewalk thereof in 1926 was composed of brick near the front building line and blocks at the curb; that he had occasion to pass over the brick sidewalk at that point for fifteen years; that he did not observe any depressions in the sidewalk he knew of; that he did not see any broken, loose or displaced bricks; that he did not observe a low place approximately two feet in circumference, and four inches deep in front of premises 107 B Street, and abutting premises 109 B Street; that the brick sidewalk was in very good repair.

"This matter was first called to my attention about three weeks ago, when I was shown a photograph of the sidewalk and stores at 109 and 107 B Street."

(Photograph taken January 31, 1927, and was offered in evidence by the defendant and was admitted in evidence and it is stipulated and agreed that the said photograph shall be filed with this bill of exceptions and may be referred to as part of the record in the Court of Appeals without actually copying said photograph in the printed record.)

60 On cross examination the witness testified that there were no repairs made to the brick sidewalk in front of 107 B Street between September 1925 and the Spring of 1926.

Thereupon **Charles E. Cornell** was recalled and testified as follows:

That he is the occupant of premises 109 B Street; that the sidewalk thereof is constructed of cement; that beneath the sidewalk a big vault is located which extends from the curb back into the basement; that under the sidewalk steam

pipes are located; that by reason of the existence of these pipes, snow never lays on the walk, and whenever it rains it generally dries up quickly; that in January of 1926 the lighting facilities in front of his premises consisted of a two hundred watt lamp in each window, and over the door and on the edge of the building; that a twelve foot electric sign with approximately 2,000 watts is erected; that the lights are turned on before it gets dark; that this practice existed in 1926.

On cross examination the witness testified that he was in the store practically every night; that he lives upstairs over the store; that he stays in the store every night until eight o'clock when his employees check up; that the vault under the sidewalk in front of 109 B Street does not extend under the sidewalk in front of 107 B Street.

Thereupon counsel for the defendant announced that he rested.

Thereupon plaintiff, **Frank Gladson Leys**, was recalled as a witness on her own behalf in rebuttal and, having been previously sworn, testified on examination, in substance, as follows:

That on the night of the accident she did not go into Cornell's; that she did not see the witness Fox; that he did not pick her up; that there was no one there but Mr. Leys; that he was the one who took her to Dr. Moffett; that when she fell she was walking toward Second Street, her face was that way.

Thereupon counsel for both sides announced that
61 their respective cases were closed.

Whereupon counsel for the defendant moved for a directed verdict upon the following grounds;

1. That the plaintiff had failed by positive proof to show that the accident was due to loose bricks so as to cause a hole in front of 107 B Street, Southeast, as in the declaration alleged.

2. That the testimony of the plaintiff failed to connect any depression with the alleged injury to the plaintiff Frank Gladson Leys.

3. That the plaintiff had failed to prove that the defendant had either actual or constructive notice of the alleged defective condition in the sidewalk in front of 107 B Street,

Southeast, which condition was the proximate cause of the plaintiff's injury.

4. That the accident happened more than three years prior to the date of the filing of the second amended declaration.

5. That the evidence was speculative, and in view thereof should not be submitted to the jury.

Whereupon the Court overruled each and every one of the motions, to which ruling the defendant then and there duly excepted, which exceptions were noted by the Court on its Minutes.

The Court granted certain prayers at the request of the plaintiff.

The Court granted certain prayers at the request of the defendant:

Prayer No. 2 of the Defendant.

You are instructed as a matter of law that the defendant, the District of Columbia, is not an insurer against injury on its streets, sidewalks, or elsewhere.

Prayer No. 3 of the Defendant.

The jury are instructed that if they find from the evidence that the plaintiff was injured while walking on the public sidewalk in front of premises 109 B Street, S. E., and not in front of 107 B Street, S. E., in the District of Columbia, they shall find for the defendant.

Prayer No. 5 of the Defendant.

You are instructed as a matter of law that in order to find for the plaintiff you must find from a preponderance of the evidence that the proximate cause of the injury sustained by the plaintiff was the negligence of the defendant in allowing a dangerous condition to exist in the sidewalk at 107 B Street, S. E., in the District of Columbia after it had actual notice thereof, or that the dangerous condition had existed for such a length of time as that it might be deemed to have constructive notice thereof.

Prayer No. 6 of the Defendant.

You are instructed as a matter of law that even though you are satisfied by a preponderance of the evidence that the plaintiff received injury you can not presume from the

mere fact of injury alone that the defendant was negligent in maintaining the sidewalk at 107 B Street, S. E., in the District of Columbia.

The Court refused to grant certain prayers at the request of the defendant, the District of Columbia, and exception to the refusal to grant each and every of said prayers was duly taken and allowed. Said refused prayers are as follows:

Prayer No. 1 for the Defendant.

You are instructed to return a verdict for the defendant, the District of Columbia.

Prayer No. 4 of the Defendant.

You are instructed that in order to find for the plaintiff you must find upon a preponderance of the evidence that a defective condition existed in the sidewalk at premises 107 B Street, S. E., and the further fact must be proven upon a preponderance of the evidence that the defendant, the District of Columbia, had actual notice of the
63 existence of such defect, or that the defect had existed for such a length of time as that it might be deemed to have constructive notice thereof.

Prayer No. 7 of the Defendant.

You are instructed as a matter of law that constructive notice arises from facts from which it may be reasonably inferred, or from proof of circumstances from which it appears that the defect ought to have been known or remedied. The law requires the exercise of ordinary or reasonable care on the part of the District of Columbia to discover the defect. In determining the question the character and notoriety of the defect must be considered, together with the fact that the municipal authorities, with their multiple duties, cannot be expected to act with the promptness and celerity of individuals conducting their private affairs.

Prayer No. 8 of the Defendant.

You are instructed as a matter of law that the duty of the Municipality is to exercise reasonable jurisdiction over its streets, and is required to take only such measures as are reasonably necessary to keep informed about the condition of its streets.

The Court charged the jury as follows:

“LADIES AND GENTLEMEN OF THE JURY: You understand we have been trying two suits, one by Mrs. Frank Gladson Leys against the District of Columbia and another by Robert H. Leys against the District of Columbia.

They have been consolidated for the purpose of trial, because the evidence, the main evidence, is the same. It is a convenience and saving of time to try them together. However, as to your verdicts, they will have to be rendered separately in each case.

We will first consider the case of Mrs. Leys. She alleges that the District of Columbia negligently permitted the sidewalk in front of 107 B street to get out of repair by permitting a brick or bricks in the sidewalk to be broken, and loosened, so that it was not securely placed as a part of the sidewalk, leaving a hole in a part of the walk, and by reason of that fact, while she was walking along at that spot, she was caused to fall and receive the injuries described in the declaration.

The declaration further alleges that the District of Columbia had notice of the defective condition of the sidewalk.

The burden of proof is upon Mrs. Leys to prove the essential allegations which she alleges in support of her claim. She must satisfy you by proof amounting to a fair preponderance of all of the evidence.

By the allegations of the declaration, met by the denials in the plea of the defendant, certain issues of fact are formed. What are they? First, was the sidewalk in front of 107 B Street in a dangerous or unsafe condition, as claimed by the plaintiff? That is the first question for you to determine.

Mrs. Leys alleges that it was. Certain testimony brought forward here tends towards proving that there was a de-

pression and looseness in some of the bricks. Other testimony brought forth by the District of Columbia tends to prove that the sidewalk was not in that condition.

65 You should take all of the evidence, pro and con, consider it carefully, draw from it your conclusions, and determine whether the sidewalk was in a reasonably safe condition for pedestrian traffic.

If you find by a fair preponderance of all of the evidence that it was in an unsafe condition, as alleged, then you will proceed to inquire into the other issues; but if you find that it was in a reasonably safe condition you need go no further.

If after weighing all the evidence you are in doubt as to whether it was in such condition, then you need to go no further, because your verdict would necessarily be in favor of the District of Columbia; but if on weighing all of the evidence you believe, by a fair preponderance of all of the evidence, that the sidewalk was in the defective condition, as alleged and contended by the plaintiff, then you will proceed in the order which I indicate, to make the following inquiries:

Did the District of Columbia have notice, or knowledge of the defect—of this alleged defect? Of course, if there was no defective condition, they they did not have knowledge. It is only on the assumption that you find this first question in favor of the plaintiff that you need proceed on with these other questions.

Did the District of Columbia have knowledge of the defective condition of the sidewalk? Is there any evidence which leads you to believe that the District of Columbia should have known, or did know, that this sidewalk in front of 107 B Street was in a dangerous condition?

I do not understand it to be claimed by the plaintiffs that the District of Columbia had actual knowledge, that is, that some responsible agent or officer of the District of Columbia had actually seen and observed the condition of the street; but it is claimed that it had what we term in law constructive notice or knowledge in this, that the dangerous condition had existed a long time prior to the accident—a sufficient time so that had the District of Columbia, in the exercise of its municipal functions given reasonable care or inspection and repair to the side-

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walk, it would in the course of that duty have observed the condition and remedied it; that it had ample time to do it.

Now, upon that question of knowledge, you go through the same process of reasoning as you do on the former issue, which I have analyzed for you.

If you believe that the District of Columbia did not have notice, that is, circumstances were not such, conditions were not such, as to give reasonable time for notice to have gotten to the District of Columbia in the manner I have suggested, then your verdict must be in favor of the District of Columbia. Or if upon that question a doubt arises on all of the evidence, you should find in favor of the District of Columbia.

But if by a fair preponderance of all of the evidence you believe that the condition had existed for a long time, and for a sufficient time for the District of Columbia to have learned of it in the reasonable exercise of its duties in taking care of the streets and sidewalks, you will resolve that issue in favor of the plaintiffs.

Then you will proceed to the next issue, which is, did Mrs. Leys fall, and was she injured by reason of this alleged defective condition of the sidewalk in front of 107 B Street?

67 It makes no difference that the sidewalk was defective, or that there was a depression in it, if it was not that depression that caused Mrs. Leys to fall. But if you find that Mrs. Leys did fall by reason of this alleged defective condition of the sidewalk, of a character to make it dangerous and unsafe for pedestrians, then you will resolve that issue in her favor, reasoning it out and coming to your determination in the same way I have suggested for determination of these other issues.

If you do not believe that this alleged unsafe condition of the sidewalk was the cause of her falling, of course you must find in favor of the defendant, or if upon that question you have a real doubt you must find in favor of the defendant; but if upon all the evidence, weighing it carefully, judging it according to calm, cold reason, you believe that a fair preponderance of the evidence is in favor of her contention that she was caused to fall by reason of such defective or dangerous condition of the sidewalk, then you will resolve that issue in her favor. Then proceed to determine what damage you should award her.

The declaration claims, as I recall it, damages not only for pain and suffering and disability, but for expenses incurred and for loss of income.

You will disregard altogether any claim for loss of income or for expenses. It is hardly necessary to point out to you that Mrs. Leys did not prove that she had any income, nor has she proven that she has either been put to or incurred any expenses in connection with this injury. So, those matters you will disregard, and confine yourselves to the pain and suffering that she may have endured, any injuries and disability that she may have sustained, and

68 determine also whether the injury is likely to last in the future, whether it is to be permanent. You have

heard testimony on that question and will determine whether it is established by the preponderance of the evidence. If your findings are in favor of the plaintiff then you will determine in a fair and reasonable way the amount of damages, wholly without any sympathy for the plaintiff and without any prejudice against her; without any sympathy or prejudice for or against either party, because such influences are wholly unworthy of you ladies and gentlemen sitting there and determining upon your solemn oaths the questions involved in this case. Sympathy or prejudice do not have any place and should not have, because as fair and reasonable men and women without being parsimonious, or without being liberal, you should try to be fair.

Of course, there is no standard by which you can measure such damages, but use your best judgment in making them fair—nothing more and nothing less. Of course, should you consider the question of the injury being a lasting injury, you should naturally have in mind the age of Mrs. Leys, her apparent state of health and the possibility of how long she should live. Such things naturally always suggest themselves in the consideration of the question of damages.

Now, in weighing the evidence, numbers do not count. Take two witnesses testifying in a contrary way upon a matter about which they have had equal opportunity for observation, both apparently honest, without any interest in the case, there you may say that one counterbalances the other. But as to each witness, you will first consider his interest or lack of interest in the case—I mean in the out-

69 come of the case, what it means to him personally in money or other consideration. That should always be taken into account. You will consider his apparent degree of intelligence, his ability to observe carefully and to relate to you accurately what he has observed. You will consider his apparent honesty, his desire to tell the truth, and whether he knows exactly what the truth is. Those things you judge, of course. Those things—a person's demeanor upon the stand, his frankness or lack of it, all of those little things known to you, as well as they are known to me, those little indications of character, of honesty and purpose. Give to each witness the weight to which you think his testimony is entitled, and then when you have done that, set on one side all the evidence in favor of the plaintiff on these issues as I have explained them, and on the other side all the opposing evidence, and then determine where the truth lies. Upon a fair preponderance of the evidence, what seems more likely—more probably to be the truth of the matter.

The District of Columbia does not insure its streets, nor does it insure pedestrians against injury upon its streets. It is only required by law to use ordinary care in maintaining its streets in a reasonably safe condition.

In this case it is a sidewalk which is, of course, intended for pedestrian traffic. So that as to a sidewalk, its only duty is one of ordinary care in maintaining its sidewalks in a reasonably safe condition for pedestrian traffic.

If this sidewalk was in a reasonably safe condition for pedestrian traffic, then you cannot say that the District of Columbia was negligent. It has performed its duties with respect to that sidewalk.

70 The mere fact that Mrs. Leys fell there on the sidewalk is of itself—the mere fact that she fell, taken alone, of itself—no evidence that the District of Columbia was negligent. It is not of itself any evidence that there was a defective condition. It is some evidence, taken along with all of the other evidence, to prove those facts, but of itself you can draw no such conclusion from it.

I am sure these things I have suggested are clear to you. Simply take time to reason it out carefully; it is merely a matter of common sense reasoning.

Of course, unless you should find in favor of Mrs. Leys, you cannot find in favor of Mr. Leys. If your verdict should

be in favor of the District of Columbia in the case of Mrs. Leys, it is not necessary for you to go any further with respect to Mr. Leys' case, because it would necessarily follow that your verdict should be in favor of the defendant as to his case.

But, should your finding be in favor of Mrs. Leys in her case, after determining what damages to award her, you will then proceed to determine what, if any damages you should award to Mr. Leys.

As the husband of Mrs. Leys, and legally responsible for her care, he claims damages for expenses to which he has been put in the treatment of Mrs. Leys, and claims on this evidence that he will have to incur future expenses for the injuries from which she claimed to be suffering.

You heard the evidence as to his expenses up to the present time. It is for you to say whether you will take the evidence as satisfactory, whether you believe it, whether it establishes by a fair preponderance of the evidence that

71 he has been put to that amount of expense up to the present time. Then you will determine from all of the evidence whether you believe the injury is of a nature that she will suffer from it in the future, and applying your best judgment determine a sum which you think may reasonably be incurred by him on account of future expenses in the treatment and care of his wife.

I think I have told you that you must find by a fair preponderance of the evidence that the accident did occur in front of 107 B Street; that the defective condition of the sidewalk was in front of 107 B Street, and that it was there that the accident occurred. If you should not find these facts by a fair preponderance of the evidence your verdict should be in favor of the defendant.

I think that covers the points which counsel wish me to cover.

Mr. Cameron: If your Honor please, with respect to your last charge, I think it would be well if you would point out to the jury that if they find that Mrs. Leys fell in front of 109 and not in front of 107—you may have covered that.

The Court: I think I have done that. I have already told you that you must find by a fair preponderance of the evidence that this defective condition was in front of 107—this alleged defective condition of the sidewalk was in front

of 107, and that it was that particular defective condition which caused her to fall and injure herself in front of 107 B Street. I have told you that unless you find that fact from a fair preponderance of the evidence, your verdict must be in favor of the defendant. In other words, if you should find that she fell in front of 109 B Street, or any other locality, you should necessarily find in favor of the defendant.

72 Anything else?

Mr. Cameron: One other point, if your Honor please. I will ask the Court to instruct the jury if they find that there was more than one defective condition or depression in front of 107 B Street that it is incumbent upon them to determine which defective condition was responsible for the accident, or rather, was responsible for the injury, and that the District of Columbia had notice, actual or constructive, of the existence of it.

The Court: Well, I think perhaps I would rather say this: That the evidence of the plaintiffs points towards the identification of a particular spot in front of 107 B Street, and you should bear that in mind in determining the question of the locality of the alleged defective condition. Of course, if the testimony of the plaintiff indicates a defective condition at a particular part of the sidewalk, and it was there that this lady fell, it is of no importance in this case that there might have been other defective spots in that sidewalk in front of 107 B Street. Does that cover it?

There is one other point which I shall call to your attention. Mr. Leys in his declaration claims in the usual phrases that are generally used, also damages for the loss of society and the services of his wife.

You will disregard that. There is no evidence of any loss of services, any loss he sustained in that respect. And, should you get to the point of determining the question of damages, confine yourself entirely to expenses he has incurred so far and those that he may reasonably have to incur in the future, if any. All other items mentioned here in his declaration, in respect to his loss, you will disregard.

I think, in view of the fact that there is an amended
73 declaration probably it is just as well not to give the declaration to the jury.

Mr. Newmyer: Yes.

Mr. Cameron: I think if your Honor please, all declarations should go to the jury.

The Court: You want them to go to the jury?

Mr. Cameron: I prefer to have them go to the jury.

Thereupon, at the request of the defendant, all declarations were delivered to the jury.

(Thereupon the jury retired to consider its verdict.)

The foregoing is the substance of all of the testimony offered in this cause. And thereupon, and as all of said exceptions were duly noted, and allowed as aforesaid, and duly entered upon the Minutes of the Court, before the jury retired to consider of its verdict, and because the matters and things hereinbefore recited are not matters of record in order to make the same a part of the record herein, which is hereby reviewed on appeal, the defendant, by its counsel, moves the Court to sign and seal this its Bill of Exceptions, and for the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is granted by the Court; and thereupon, the defendant tenders this, its Bill of Exceptions, and requests
74 the Court to sign and seal the same, which is accordingly done, now for then, this 20th day of October, 1931.

JAMES M. PROCTOR,

Justice.

Seen and approved as to form and substance.

A. C. NEWMYER,

Attorney for Plaintiffs.

Endorsed on cover: District of Columbia Supreme Court. No. 5536. District of Columbia, a municipal corporation, appellant, vs. Frank Gladson Leys; and No. 5537. District of Columbia, a municipal corporation, appellant, vs. Robert H. Leys. Court of Appeals, District of Columbia. Filed Oct. 29, 1931. Henry W. Hodges, Clerk.



FEB 6 - 1932

IN THE *Henry W. Hodges*
Court of Appeals, District of Columbia ^{CLERK}

OCTOBER TERM, 1931.

No. 5536

DISTRICT OF COLUMBIA

Appellant

VS.

FRANK GLADSON LEYS,

Appellee.

No. 5537

DISTRICT OF COLUMBIA

Appellant

VS.

ROBERT H. LEYS,

Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from the Supreme Court of the
District of Columbia.

On December 11, 1928, the appellee, Frank Gladson Leys, plaintiff below, sued the appellant, the District of Columbia, defendant below, for personal injuries sustained on January 17, 1926, at or about 6 o'clock P. M., alleging that when "plaintiff was lawfully engaged in walking on the sidewalk on the south side of B Street, S. E., between Maryland Avenue and 2nd Street, S. E. * * *," she was injured as the result of the negligence of the appellant "in permitting a brick or bricks in front of, to wit, premises No. 27 B Street, S. E., and constituting a part of the said sidewalk, to become broken, crumbled, loosened or sunken below the level of said sidewalk." (R. p. 2). On motion of the appellant to require the appellee to make the declaration more definite and certain as to the exact location of the alleged accident and the specific point on the highway where the alleged injury was sustained (R. p. 3), the appellee on January 18, 1929, filed an amended declaration alleging that "* * * plaintiff was lawfully engaged in walking on the sidewalk on the south side of B Street, S. E., between 1st and 2nd Streets, S. E., in the District of Columbia," and the appellee was negligent "* * * in permitting a brick or bricks in the sidewalk in front of, to wit, premises No. 109 B Street, S. E., and constituting a part of said sidewalk to become broken and loosened, so that it was not securely placed as part of said sidewalk and leaving a hole in part of said sidewalk * * *." (R. pp. 3 and 4). On plea filed (R. pp. 4-5) issued

was joined (R. p. 5). Thereafter, on May 14, 1931, the appellee moved to amend the amended declaration by changing the words of said declaration to read "in front of, to wit, premises 107 B Street, Southeast." (R. p. 6). Over the objection of the appellant said amendment was permitted by the Court. (R. p. 6). To the amended declaration the appellant filed three pleas; first, denying either actual or constructive knowledge of the existence of any defect in the highway in front of premises 107 B Street, Southeast; second, denying that the appellee was injured in front of premises 107 B Street, Southeast, and further pleading that if she was injured at all it was as the result of a fall in front of premises 109 B Street, Southeast, and further denying that the injuries sustained were the result of any neglect or failure on the part of appellant, and third, a plea of limitations. (R. pp. 6-7). To the pleas aforesaid the appellee joined issue (R. p. 7).

The appellee, Robert H. Leys, plaintiff below, sued the appellant, the District of Columbia, defendant below, on January 16, 1929, for loss of services of his wife, Frank Gladson Leys, and expenses incurred by reason of the alleged injuries sustained by her on January 17, 1926, alleged to have been sustained "* * * in front of, to wit, premises numbered 109 B Street, Southeast, * * *" (R. pp. 11-12). On plea filed issues were joined (R. pp. 12-13). On May 14, 1931, when the matter was called for trial, after leave of Court was

granted, over the objection and exception of the appellant, the appellee was permitted to amend his declaration by changing the words therein contained “* * * in front of, to wit, premises 109 B Street, Southeast,” to the words “in front of, to wit, premises numbered 107 B Street, Southeast.” (R. p. 14). To the amended declaration the appellant filed three pleas, which were, in substance, similar to those filed in the matter of Frank Gladson Leys vs. the District of Columbia. (R. pp. 14-15). To the pleas aforesaid the appellee joined issue. (R. p. 15).

In support of her cause of action, the appellee, Frank Gladson Leys, called as a witness Dr. F. Watson Moffett, who testified that he first came to know the appellees on January 17, 1926, when the appellee, Frank Gladson Leys, was brought to his office for treatment by the appellee, Robert H. Leys, and, he believed, another man. (R. p. 22). The witness further testified that in January, 1926, the condition of the surface of the sidewalk in front of 107 B Street, Southeast, was familiar to him as for a number of years he had been going over it at least once a day when he ate his lunch at the corner lunch room or at Cornell's lunch room, 109 B Street, Southeast (R. pp. 23-24); that at the time of the accident in January, 1926, the surface of the sidewalk in front of 107 B Street, Southeast, was paved to a little less than half of the sidewalk adjoining the building with brick and the rest of it with a square paving block

of a composition described by the witness as some kind of asphalt; that the sidewalk in front of premises 109 B Street, Southeast, was comparatively newly paved with cement; that the brick portion of the sidewalk in front of premises 107 B Street had been down there for forty-one years, and that to his knowledge that portion of the sidewalk had not been repaved at any time prior to the accident; that the day after he treated the appellee, Frank Gladson Leys, he had occasion to look at the brick portion of the sidewalk in front of 107 B Street. The bricks had been worn just simply from natural traffic over them for a period of years; some of the bricks were worn to less than half of the original thickness; the bricks were evidently of an old vintage because there were pebbles that had not worn off, making rough places in the brick. Some of the bricks were cracked in two. The surface level of part of the sidewalk was very uneven. There were certain uneven surfaces there. The witness further testified that he could not specifically point out the exact location of any one at the present time (R. p. 24). The witness further testified that the brick sidewalk was uneven and that bricks were loose in spots. (R. p. 25).

On cross-examination, the witness testified that he would not call the sidewalk in good repair; that a number of the bricks were worn to only one-half of their original thickness; that some were cracked in two. The witness further testified that he

never had taken any of the bricks out of the walk to determine whether or not they had been worn to half their size or half the original size; that it was not necessary so to do; that you could see them. That there were a number of places in front of 107 B Street on the brick portion of the sidewalk that were defective, but that he could not tell exactly where they were located; that the bricks composing the sidewalk were worn, cracked and loose, but that he did not try to dislodge any of them; he had not observed any bricks worn or pushed out by reason of persons walking over them. The witness then illustrated to the jury on a blackboard as to the number and location of the uneven places in the sidewalk, four of such places, placing them at intervals on the sketch drawn. (R. p. 28).

The appellee, in support of her cause of action, called John F. Ford, who testified that he is employed at Cornell's Lunch Room, 109 B Street, Southeast, and has been so employed since May of 1925. He testified that he recalled the condition of the sidewalk of 107 B Street in January of 1926; that the same was constructed partly of brick and partly of blocks; that the brick extended from the building line toward the curb about half way to the center of the sidewalk where the block paving began and extended to the curb; that the brick part was very uneven, some of the bricks were sunken in a lot of places; that he never paid any particular attention to it walking over it ex-

cept while walking off of the pavement, then he noticed it was very rough and uneven; that at a point on the sidewalk in front of 107 B Street, and near the dividing line of 109 B Street there was a cave-in; one place was lower than the other, there was a space something like two feet; that he could not tell whether the bricks at the bottom of the cave-in were firm or loose; that the depression was the width of six or eight bricks; and the depression was three or four inches lower than the rest of the sidewalk. That he first observed this condition some time in 1925, and it was in the same condition in January of 1926, and that, so far as he knew, had not been repaired at any time from the time he went to work in 1925 until after the accident in January 1926. The witness further testified that he never paid particular attention to it and had never inspected it. (R. pp. 28-29).

On cross-examination, the witness testified that some of the bricks were caved-in in front of 107 B Street; that the sidewalk was very uneven, some bricks seemed to be better than others in walking over them; that there were several such low places; that he had never noticed any bricks being out, or any holes in the sidewalk or any broken or cracked bricks; that the depression in front of 107 B Street near the dividing line of premises 109 B Street was not caused by the removal of any bricks; that he had never seen any bricks removed. (R. pp. 29-30).

Upon redirect examination, the witness testi-

fied that he never paid particular attention to the bricks in the sidewalk in front of 107 B Street, and that he had never noticed any broken or loose bricks; but had noticed that in this place they were lower than others. (R. p. 30).

The appellee, Frank Gladson Leys, in order to further maintain the issues on her part joined, called Robert H. Leys, who testified that he is a resident of New York; that he is the husband of Frank Gladson Leys; that in January of 1926 he and Mrs. Leys were in Washington; that on January 17, 1926, he and Mrs. Leys had occasion to walk along B Street, Southeast. That they walked on the south side of said B Street between First and Second; that at about six thirty o'clock, it was a dark, a pretty dark night; that you could not see your hand before your face; that Mrs. Leys was on his right side; that there were no lights. Whereupon, the following question was propounded to him:

"Q. Now, how far had you gone along B Street before something happened, and just tell the Court and the jury what did happen.

A. Not quite as far as Cornell's. When I crossed Cornell's building line, or I was just coming to it at the time, I do not know—I did not measure it—but my wife suddenly fell; it was not slippery. It had been sleeting. It had been raining, but the sidewalk was perfectly clear from ice, there was no ice at all, there was nothing slippery about it when she fell down like that, and I immediately

jumped down and put my hand along her foot in a hole, and in that hole there was about half a brick that was loose, and I pulled it out, and then I lifted her up, and my hand was all muddy, and I got it on my face too. I picked her up and put her on my shoulder and ran with her to Dr. Moffett's office, she was bleeding. Her teeth were all broken, and she was moaning and crying. (R. pp. 30-31). The witness further testified that he looked at the piece of brick that he had picked up that night and found it was about a half a brick; that the hole was of a size, indicating by putting his hands together in an oval shape probably about half the size of his head; that when he reached down her foot was across the hole and he pulled the part of brick from under her foot; and that the depth thereof was about three-quarters of his hand; that he had never noticed that place in the sidewalk before." (R. p. 31).

Upon cross-examination the witness testified that he could not tell whether Frank Gladson Leys fell in front of 107 or 109 B Street, because he did not know where the dividing line is. Upon question as to whether his wife fell in front of the fruit stand (107 B Street), or in front of Cornell's Lunch Room (109 B Street), the witness testified that he did not know where the dividing line is between 107 and 109, and he could not swear to something that he did not know. It was one of the two spots.

Whereupon the following question was propounded by counsel for the appellant:

"Q. Do you know whether she fell in front of 107 or 109?

A. May I answer that in my own way, if the Judge will permit me?

The Court: Yes.

A. When I am standing northwest from the west end entrance door of Cornell's Lunch Room, that is in a southeast direction from my position, when I stand over there, that is the best I can answer that.

Mr. Cameron: Then that—

Mr. Leys, interposing: "and if you were in front of 107, but as I told you before, I do not know where the dividing line is there; I cannot tell you whether it is 107 or 109, I gave all of the information about that, and that is the origin of the information." (R. p. 33).

The appellee, Frank Gladson Leys, in order to maintain the issues on her part joined, in response to the following question, testified:

"Q. Mrs. Leys, did you have any opportunity to observe the place that you fell on the night of the accident, the night the accident happened, or at any time after that? A. I think one day when I was walking by there, going across there, I said 'now where was it I fell,' I said that to Mr. Leys, and he says—

Q. Don't tell us what he said. A. Well it was along there somewhere; I can't tell you the exact

location, it would be impossible, I could not. My foot caught—I don't know whether it was a brick that was partly out, but it was lower than the other part of the sidewalk, anyway I caught my foot or toe or something, and it threw me." (R. p. 35).

The appellant, in order to maintain the issues on its part joined, called as a witness Harry Hingham, who testified that he conducts a business at 105 and in the rear of 107 B Street, Southeast, and that he has so conducted such business at that address for something over thirty years; that he was acquainted with the condition of the sidewalk in front of 107 B Street, Southeast, in January of 1926; that the same was constructed part of brick to half the distance to the curb from the front building line and the balance with square blocks; that he had occasion to observe the condition of the sidewalk in front of 107 B Street in January of 1926; that to the best of his belief the same was in good condition; that he had occasion to pass over the walk several times a day going back and forth to his place of business carrying gasoline which was served to customers at the curb; that he did not observe any low place or places on the building line between 107 and 109 B Street. (R. pp. 36-37).

Upon cross-examination the witness testified that the only reason he had for observing the condition of the sidewalk in 1926 was such as a man walking across a sidewalk, seeing a defect there

would be apt to have it called to his attention forcibly and the only other fact that having walked across the sidewalk a number of times and not having stumbled himself or observed any bad places. (R. p. 37).

The appellant called George B. Bryan, who testified that in January of 1926, he was engaged in the restaurant business at 101 B Street, Southeast, and that he was the owner of premises 107 B Street, Southeast; that in January, 1926, he passed over the sidewalk every day; that he did not observe any depression in the brick walk other than what the ordinary brick walk shows; that he did not observe any low places in the walk or a low place approximately two feet in circumference and four inches deep; that he did not observe any broken or loosened bricks or that any of them were displaced.

Upon cross-examination, the witness testified that he owned premises 107 B Street from 1912 to 1926; that he did not know of any repairs being made to the brick sidewalk during that period; that the witness had no occasion to make any inspection of the brick sidewalk. (R. p. 37).

Upon redirect examination, the witness testified that the condition of the brick sidewalk when he saw it, after it was taken up, looked like it was good for another hundred years. (R. p. 38).

The appellant called Virgil S. Bryan as a witness, who testified that he is engaged in the lunch room business at 1st and B Streets, Southeast,

and has been so located for a period of about ten years; that he was acquainted with premises 107 B Street; and testified that in 1926 the sidewalk was paved with brick to about midway thereof; that he had occasion to pass over the center of this sidewalk in January of 1926 practically every day; that he did not observe any low place or places or depressions or that there were any bricks loose in that part of the sidewalk; that he did not observe at any time a low place approximately two feet in circumference and four inches deep in front of premises 107, and abutting the property line of 109 B Street (R. p. 38).

The appellant, in order to further maintain the issues on its part joined, called as a witness Howard Venable, who testified that he is a member of the Metropolitan Police Department, attached to No. 5; that he was generally assigned to the patrol of No. 1 beat, which said beat included B Street, Southeast, between First and Second Streets; that he was acquainted with premises 107 B Street; that in 1926 the sidewalk in front thereof was constructed partly of brick and partly of square blocks; that while patrolling that street he had occasion to observe the condition of the brick walk; that he never observed anything out of the ordinary there; that the bricks seemed to be in very good condition; that he did not observe any holes or loose bricks or low depression approximately two feet in circumference and four inches deep in front of premises 107 B Street; that he had never

received any report of an injury in front of 107 B Street. (R. pp. 38-39).

Upon cross-examination, the witness testified that he had never made any inspection of that brick sidewalk, and that he knew that it was his duty to report defects in sidewalks; that he had never made such a report because he had never observed anything to report. (R. p. 39).

The appellant, in order to further maintain the issues on its part joined, called J. R. Harris as a witness, who testified that he is a police officer, and that in January, 1926, he was assigned to No. 5 Precinct, and that while so assigned he patrolled No. 1 beat; that No. 1 beat included B Street, between First and Second, Southeast; that he was acquainted with 107 B Street, and that many times while on his tour of duty he had occasion to pass over the brick sidewalk; that he observed the condition thereof; that he had never observed a low place approximately two feet in circumference and about four inches deep; that he had never observed any broken or loose bricks or any holes caused by the displacement of bricks. (R. p. 39).

Upon cross-examination, the witness testified that the surface of the sidewalk showed no depressions other than that were there in an ordinary walk where people are walking over wear it down. (R. p. 40).

The appellant, in order to further maintain its issues, called Wilford P. Als, who testified that he

is acquainted with premises 107 B Street, and became so acquainted through daily visits to premises 105 B Street, Southeast; that the sidewalk abutting premises 107 B Street, Southeast, in January, 1926, was constructed of red brick from the front building line of said premises to the center of the sidewalk; that from that point on it was constructed of paving blocks. That he did not observe any low places or depressions or loose or broken bricks in front of said premises; that he did not observe a depression or low place approximately two feet in circumference and four inches deep in front of premises 107 and abutting the building line of 109 B Street, Southeast. (R. p. 41).

Upon cross-examination, the witness testified that it was his duty to report any defects in the streets which were observed by him; that he did not observe any defects in front of premises 107 B Street.

Thereupon, the appellant, in order to further maintain the issues on its part joined, called Thomas E. Blasey, who testified that he is a member of the Metropolitan Police Department, and that his post of duty for the past twelve or thirteen years has been located at 1st and B Streets, Southeast; that he on frequent occasions passed over the brick sidewalk in front of 107 B Street, Southeast; and that he had never noticed anything out of the ordinary; that he did not see any depression or any low place or any broken or displaced bricks in front of 107 B Street; and that he did not recall

observing a low place about two feet in circumference and about four inches deep in front of premises 107 B Street. (R. p. 42).

In order to further maintain the issues on its part joined, the appellant called Charles E. Cornell, who testified that he is in the restaurant business located at 109 B Street; that he has been so located for eight years; that he has lived in that vicinity for approximately twenty-two years; that he is acquainted with the condition of the sidewalk in front of 107 B Street from January, 1926; that he walked over the said brick sidewalk every day; that he did not observe any depression or any holes or any broken, loosened or displaced bricks; that he did not know of any low place approximately two feet in circumference and four inches deep in front of 107 B Street. (R. pp. 42-43).

The appellant then called John Michael Fox in order to further maintain the issues on its part joined, who testified that in January of 1926 he was employed at Cornell's restaurant at 109 B Street, Southeast; that one of his duties was to sweep the sidewalk in front of said premises which was done nearly every day; that he knew the appellee, Frank Gladson Leys, and had first come to know her when she was injured; that the accident happened some time in January, 1926; that he believed the day when the accident happened to have been a Sunday; that it was still light according to his recollection; that he was standing in the show window at Cornell's restaurant, which he identi-

fied to be the window near the dividing line of 107 and 109 B Street; that he saw something fall; that he did not know it was a lady; that he noticed a lady pass, but did not pay any particular attention to her; that he went out on the sidewalk and saw that it was a lady that fell; that she scrambled to her feet, and he took her left arm and lifted her up, and that he took her into the restaurant; that he was "most sure" that the accident happened in front of 109 B Street.

Upon cross-examination, the witness testified that by "most sure" he meant "positive." The witness further testified that he remembered picking Mrs. Leys up off of the cement; that she fell while she was going toward First Street; and that he was the only one that helped her up. (R. pp. 44-45).

Thereupon, appellant, in order to further maintain the issues on its part joined, called Willis Fillebrown, who testified that he had been employed at Cornell's Lunch Room since September of 1925; that he was acquainted with the condition of the sidewalk in front of 107 B Street, Southeast, in January of 1926; that the sidewalk was composed of brick near the front building line and blocks at the curb; that he had occasion to pass over the brick sidewalk at that point for approximately fifteen years; that he did not observe any depression in the sidewalk that he knew of; that he did not see any broken, loose or displaced bricks; that he did not observe a low place ap-

proximately two feet in circumference, and four inches deep in front of premises 107 B Street and abutting premises 109 B Street; that the brick sidewalk was in very good repair. (R. p. 46).

The witness Charles E. Cornell was recalled, who testified that he is the occupant of premises 109 B Street; that the sidewalk thereof is constructed of cement; that beneath the sidewalk a big vault is located which extends from the curb back into the basement; that under the sidewalk steam pipes are located and that by reason of the existence of these pipes, snow never lays on the walk, and whenever it rains it generally dries up quickly; that in January of 1926 there was a two hundred watt lamp in each window, and over the door and on the edge of the building was a twelve foot electric sign with approximately two thousand watts; that the lights were turned on before it gets dark and that this practice existed in 1926. (R. pp. 46-47).

The jury returned a verdict in favor of Frank Gladson Leys in the sum of \$7,500, and in favor of Robert H. Leys, her husband, in the sum of ~~\$2,000~~ \$2,000.00

ASSIGNMENT OF ERRORS.

The appellant assigns as errors committed by the trial court the following:

1. In permitting the plaintiffs to further amend

their amended declarations, by changing the location of the alleged hole or depression.

2. In admitting in evidence, over the objection and exception of the defendant, certain paper writings purporting to be bills rendered and unpaid for medical services rendered the plaintiff, Frank Gladson Leys.

3. In admitting in evidence, over the objection and exception of the defendant, the testimony of the witness Robert H. Leys, regarding the medical services furnished the plaintiff, Frank Gladson Leys, and the charges therefor.

4. In failing to direct a verdict for the defendant at the close of the plaintiff's case upon the showing that the alleged accident occurred more than three years last past prior to the filing of the second amended declaration.

5. In failing to direct a verdict for the defendant at the close of the entire case.

ARGUMENT.

POINT I.

The Duty of the Municipality With Respect to Its Streets and Highways, and Its Obligation to Persons Using Them.

The rule in the case of *District of Columbia vs. Woodbury*, 136 U. S. 450, settled for all times the duty of the municipality with respect to its

streets and highways and its obligations to persons using them. In that case the Court held (P. 463) :

“1. The District government, as a municipal corporation, is charged with the duty of supervising the streets of Washington and keeping them in a condition fit for convenient use and safe against accidents to travelers using them. But it is not under an absolute obligation to respond for every accident a man may suffer in its streets. It is simply bound to practice due care and diligence in the exercise of its powers and in the application of its resources towards the objects named. If its duty has been fully performed in regard to any particular street and that street has been put in good condition, safe against all accidents that could be foreseen and provided for, and afterwards, by some casualty, it falls into dilapidation and becomes dangerous, * * * the rule is that the District government is not responsible for the injury that results, unless it had timely notice of the dangerous condition of the street, so that it could be put in repair and the danger obviated. This notice is either actual or constructive; the latter meaning that the District authorities, within the scope of their opportunities and money, being under an obligation to exercise a general supervision of the streets, and to keep themselves informed about their condition, if a street remains in a dangerous condition so long that the authorities could not help, in the exercise of ordinary care and diligence, knowing that

fact, and did not know it because they failed to exercise proper vigilance, then the law imputes notice to them; in other words, they have notice in contemplation of law, and that is constructive notice.

“2. No certain duration of a dangerous condition of a public highway operates of itself as a notice. The law does not require impossibilities of any person, natural or artificial, and it is impossible that *all parts* of all the streets should be under constant inspection. * * *.”

(Italics supplied).

From the rule aforesaid, there is to be adduced three principles, which are to guide in determining liability on the part of the municipality:

1. That the municipality is charged with the duty of maintaining its streets and highways in a reasonably safe condition.

2. It is incumbent upon the aggrieved party to show that the municipality had either actual or constructive knowledge of the defect before the rule above is applicable.

3. In determining the existence of constructive notice the law does not exact the impossible, and it is impossible that all parts of the streets should be under constant inspection.

POINT II.

Proof of Negligence.

In *Bennett vs. Washington Terminal Co.*, 55 App. D. C. 111-113, Mr. Justice Van Orsdel, speaking for the Court, held:

“Negligence is a matter of proof to be established by competent evidence. The burden of establishing negligence is upon the complaining party. The mere fact that an accident occurred creates no presumption of negligence on the part of the defendant company. It is an affirmative fact incumbent upon the plaintiff to prove and establish by such direct and positive evidence that the jury may reasonably infer the facts upon which negligence may be predicated.”

Negligence, being as the Court held in the *Bennett* case, *supra*, an affirmative fact incumbent upon the plaintiff to prove, in a case where the rule of the *Woodbury* case is invoked, it becomes the duty of the plaintiff to show by such direct and positive evidence that the jury may reasonably infer the facts to be:

1. That a highway in the District of Columbia, over which the municipality had jurisdiction and control had become defective.
2. That the defect in the highway was the proximate cause of the injury sustained.

3. That the municipality had either actual or constructive knowledge of the existence of the defect.

It follows therefore, that the plaintiff having elected to invoke the rule of the Woodbury case, *supra*, all of the elements prescribed thereby must be present at the trial and be supported by such direct and positive proof that the jury may reasonably point to the condition responsible for the injuries alleged to have been sustained.

It is a fundamental rule that the mere fact that an accident occurs creates no presumption of negligence on the part of the defendant. (*Bennett vs. Washington Terminal Company, supra*). It therefore, follows from this rule that the mere fact that a person is injured while walking on the public highways is not presumptive of negligence on the part of the municipality.

In all cases the burden of proof is upon the plaintiff who is necessarily bound to establish by affirmative proof the casual relation between the alleged negligence and the accident. (*Collins vs. D. C. (1930) Court of Appeals, D. C. No. 5039*).

This proof cannot be left to inference or conjecture but must be sustained by direct and positive proof. (*Bennett vs. Washington Terminal Company, supra*).

As said by Mr. Chief Justice Martin, in the Collins case, *supra*:

“An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. The Court has repeatedly held that when liability depends upon carelessness or fault of a person, or his agents, the right of recovery depends upon the same being shown by competent evidence; *and it is incumbent upon such plaintiff to furnish evidence to show how and why the accident occurred * * **”

(Italics supplied).

POINT III.

Application of Points I and II to This Appeal.

The appellant is charged by the appellee, Frank Gladson Leys, with negligence “* * * in permitting a brick or bricks in front of, to wit, premises 107 B Street, Southeast, and constituting a part of said sidewalk to become broken or loosened, so that it was not securely placed as part of said sidewalk and left a hole in part of said sidewalk, which negligent condition had existed for a long time, of which said defendant had notice, * * *.”

The issue raised resolved itself into four propositions which, to entitle the appellee to recover under the rule of the Woodbury case, *supra*, the jury must, from the evidence, find:

1. That an injury was sustained in front of premises 107 B Street, and on the public highway.

2. That the injury was sustained by reason of the negligence of the appellant in permitting a defect to exist in said highway at the location alleged.

3. That the injury was sustained as the result of a fall into a defect occasioned by loose bricks so as to cause a hole.

4. That the appellant had either actual or constructive knowledge of the existence of the defect alleged.

Reviewing the evidence adduced at the trial, the testimony offered by the appellee, Frank Gladson Leys, is devoid of any information that could possibly locate the scene of the alleged injury. Her testimony with respect to the location is that she was walking along B Street in company with her husband; (R. p. 34) that she fell; that the place where she fell was along there somewhere; “* * * *I can't tell you the exact location.*” (R. p. 35).

The testimony of the appellee, Frank Gladson Leys, shows that the only person present at the time of the alleged accident was Robert H. Leys, appellee's husband (R. p. 35); who testified, (R. p. 30) that he was walking along B Street with the appellee; that they had not proceeded as far as Cornell's—that when they crossed Cornell's building line, or they were just coming to it, he did not know, the appellee fell. On cross-examination the witness Leys testified that he gave the location of

the accident as being either 107 B Street or 109 B Street, and that he was not positive whether it was 107 or 109 B Street (R. p. 32). Whereupon, the following question was propounded to the witness by appellant's counsel:

"Q. Now can you tell the Court and jury whether your wife fell in front of the fruit stand, or in front of Cornell's Lunch Room, where your wife fell?"

to which the witness replied:

A. *I have answered that before, and I told you that I do not know where the dividing line is between 107 and 109, and how can I tell you, or how can I swear to something I do not know? It was one of the two spots.*" (R. p. 33).

(Italics supplied).

The witness testified, however, that he had passed along B Street many times while going to Cornell's Restaurant. (R. p. 34).

The witness further testified that he gave the information contained in appellant's second amended declaration alleging the accident to have occurred at 109 B Street, and further testified with respect to the location "I do not know now, and I am not positive which it is 107 or 109, but I believe it is 107. It originated with me, the number, and all I know is what I saw on the building. I cannot swear whether it was 107 or 109." R. p. 32).

There is a decided conflict between the testimony of the witness Moffett and that of the witness Ford. The witness Moffett testified that the brick portion of the sidewalk in front of 107 B Street was very uneven, but he could not give the location of any of the number of depressions testified by him to have existed. (R. pp. 24-25-26-27-28). Witness Ford testified that a depression existed near the dividing line between 107 and 109 B Street, and that he did not pay particular attention to it, except while walking off of the brick sidewalk. (R. p. 28, 29).

Testimony was available to show that premises 107 B Street was improved by a frame building occupied by a fruit stand. (R. p. 24). That the sidewalk abutting those premises were improved with brick to approximately half the distance to the curb; the balance of the sidewalk being paved with asphalt blocks (R. p. 24). That premises 109 B Street was occupied by Cornell's Restaurant and the sidewalk was paved with cement. (R. p. 24).

There is no testimony in the entire record to show that at any time the appellee was walking on that portion of the sidewalk of 107 B Street that was paved with brick, except the inference created by the witness Leys who testified, (R. p. 31) “* * * and I immediately jumped down and put my hand along her foot in a hole, and in that hole there was about half a brick that was loose, and pulled it out, * * *.”

From the testimony of both appellees, Frank Gladson Leys and Robert H. Leys, who alleged that they were the only ones present at the time of the alleged accident (R. pp. 35-30) nothing is available to conclusively prove that the scene of the injury was in front of 107 B Street, S. E. There was, however, evidence adduced by the appellant that the appellee, Frank Gladson Leys, fell in front of 109 B Street, S. E., on the cement sidewalk. (R. p. 44). Taking the testimony of the witness Robert H. Leys in its most favorable light an inference or a mere scintilla of evidence is available that it occurred in front of 107 B Street, S. E.

The Supreme Court of the United States in *Gunning vs. Cooley*, 281 U. S. 90, speaking of such evidence, said:

“A mere scintilla is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.” *Improvement Co. vs. Munson*, 14 Wall. 442.

We respectfully submit that:

(1) There was no direct or positive evidence to establish the fact that the appellee,

Frank Gladson Leys, was injured in front of premises 107 B Street, S. E.

In this regard it must be remembered that the burden of proof rested upon the appellee to furnish evidence to show how and why the accident occurred.

Bennett vs. Washington Terminal, *supra*.
Collins vs. D. C., *supra*.

(2) It required speculation, in view of the evidence, on the part of the jury to find that the injury was caused by "loose bricks, so as to cause a hole," because of:

(a) lack of evidence to show that the appellee was injured in front of premises 107 B Street; and,

(b) the lack of competent evidence that the appellee was walking upon any walk composed of bricks at the time of the injury.

(3) Without the positive location of the alleged defect, it is impossible to determine the existence of either actual or constructive notice with respect to the defect which was the proximate cause of the injury.

The law is well settled that, so far as the municipality is concerned, it is not enough to allege and prove that an injury was sustained on its highways. Another and important element must be present and proven, i.e., *notice*.

D. C. vs. Woodbury, *supra*.

With the evidence as hereinbefore outlined, the jury in being given the case, were compelled to guess and speculate as to:

1. The exact location of the depression responsible for the alleged injury.

2. That the appellee, Frank Gladson Leys, fell as the result of the existence of a depression occasioned by loosened bricks so as to cause a hole in the public highway.

3. That as to the location of the depression, and the depression itself, the appellant had either actual or constructive notice of its existence.

The learned trial justice charged the jury, among other things, as follows (R. p. 52):

“It makes no difference that the sidewalk was defective, or that there was a depression in it, if it was not that depression that caused Mrs. Leys to fall.”

The instruction above is borne out by the rule of *Collins vs. D. C. et al.*, *supra*, holding:

“The casual connection between the accident and the negligence must not be left to mere conjecture or speculation.”

We interpret the foregoing rule to mean that the binding link between the accident and the negligence must be real and tangible; and that the evidence must be such that the jury can point with reasonable certainty to the failure of duty responsible for the accident.

Assuming for the sake of argument that the evidence showed that the appellee, Frank Gladson Leys, sustained injuries in front of 107 B Street, S. E., which we respectfully urge not to be the case—the testimony of the witness Moffett tends to show that the sidewalk abutting 107 B Street contained certain uneven surfaces but that he could not point out the exact location of any one at the present time. (R. pp. 25-28). The witness Ford located a depression near the dividing line between premises 107 and 109 B Street. (R. p. 29). No word of testimony is available to connect any of the depressions alleged to have existed in that sidewalk with the injury claimed by the appellee to have been sustained at 107 B Street. Likewise, not a word of testimony is available to show that the depressions alleged by the witness Ford to have existed was observed by the witness Moffett.

Only three witnesses testified in the case with respect to the happening of the accident. The witness Fox testified that Mrs. Leys fell in front of premises 109 B Street. (R. p. 44). Mrs. Leys did not state where the accident happened or occurred. Mr. Leys testified that he and Mrs. Leys lived at 222 A Street S. E., (R. p. 30); that he had passed along B Street between First and Second Streets many times while going to Cornell's restaurant (R. p. 34); that he could not say whether Mrs. Leys fell in front of 107 or 109 B Street because he did not know where the dividing line was (R. p. 32); that when Mrs. Leys fell he put his hand along her foot in the hole, and in that hole there was about half a brick that was loose; "that he looked at the piece of brick that he picked up that night and found it was about half a brick; that the hole was of a size, indicating by putting his hands together in an oval shape probably about half of the size of his head; that when he reached down her foot was across the hole and he pulled the part of brick from under her foot; and that the depth thereof was about three-quarters of his hand; *that he had never noticed that place in the sidewalk before;*" (R. p. 31). No other witnesses testified as to the existence of a hole of this description and Mr. Leys, although he stated he has passed over this sidewalk many times, stated he had never noticed that place in the sidewalk before. Under these circumstances how can the

District be charged with notice of the existence of the hole described by Mr. Leys?

To find for the appellee under such evidence would:

1. Be imposing upon the appellant the duty of insuring the safety of all persons using the highway—which is contra to the accepted rule.

2. Be contra to the rule of the Woodbury case, in that one of the fundamental rules of determining liability would be obviated. The doctrine of notice would become a nullity.

3. Be invoking a principle, the contra of which is firmly established, that the happening of an accident would be a presumption of negligence.

4. Discard the well founded principle that “* * * the District government is not responsible for the injury that results, (because of the existence of a depression in its highways) unless it had timely notice of the dangerous condition of the streets. * * *.”

(Parenthesis supplied).

D. C. vs. Woodbury, *supra*.

POINT IV.

Errors of the Trial Justice.

A. In admitting in evidence the testimony of the witness Robert H. Leys regarding medical services furnished the appellee, Frank Gladson Leys and the charges therefor.

B. In admitting in evidence certain paper writings purporting to be bills rendered and unpaid for medical services rendered the appellee, Frank Gladson Leys.

The testimony of the witness Robert H. Leys tended to show that after the accident when the appellee returned to New York she went under the care of Dr. Peer and Dr. Burns who treated her for the injury to her hand. (R. p. 31).

The appellee testified that when she left Washington after the accident she returned to White-stone, N. Y.; that she was treated by Dr. Peer; the frequency of his visits was generally once in three or four days and sometimes once in two days, according to the pain; that the course of treatment was the use of violet ray and something to put on her hand; that in 1926 she saw him less than three weeks between visits, and that thereafter he treated her whenever the pain was such that attention was needed. That she first saw Dr. Burns about two months after the accident; that

he examined her hand, ankle and knee; that when she was in Seacliffe she was attended by Dr. Burns. (R. p. 35).

The witness Moffett testified that on January 17, 1926, he examined the appellee and found her condition to be: a cut on the forehead, not requiring a suture, lip was cut, complained of pains to her right hand, right knee and ankle were bruised. (R. p. 23). Several months later he made an examination and found that the appellee had developed an exostosis; that he did not determine whether she had sustained any other injury during the interim and that the condition then existing could be due to another injury. (R. p. 26).

At no time during the course of the trial was either Dr. Burns or Dr. Peer offered as a witness; nor was their absence explained, nor was any attempt made to obtain depositions from these witnesses.

The witness Robert H. Leys testified (R. p. 37) that Dr. Peers' charges totaled \$250 and Dr. Burns' charges were \$500. Over objection of appellant's counsel (R. p. 31-32) paper writings purporting to be bills rendered by Dr. Peer and Dr. Burns in the amounts stated were offered and received in evidence.

"The rule that the measure of recovery for expenses is a reasonable sum, and not the amount actually paid out, applies to a recovery for medical expenses or nurse hire, and while evidence of the amount paid or agreed

to be paid may be considered *it must be accompanied or followed by evidence that such amount was reasonable and its expenditure necessary.* * * * *There can be no recovery in the absence of evidence from which the amount to be allowed can be properly determined,* although it appears that plaintiff required medical attention and actually had physicians in attendance for a considerable period as a result of the injuries complained of. In order that there may be a recovery for medical services there must be evidence as to the value of such services. It is not sufficient to show what the physicians charged plaintiff, nor, it has been held, is such evidence admissible without other evidence as to the value of the services, * * *."

17 C. J. 915-917.

(Italics supplied).

The rule as stated above may be otherwise stated as follows:

1. *That the measure of recovery for expenses is a reasonable sum.*

In *Hunt vs. Boston Terminal Co.*, 98 N. E. 786, it was held:

"In an action by a husband to recover for expenses incurred for medical services for his wife, who was injured in an accident negligently caused by the defendant, the husband can recover an amount equal only to the fair value of the services rendered by physicians

and surgeons, and for which they could recover as plaintiffs in an action against him; this being true regardless of the amount expended."

See also—8 R. C. L.

"Recovery is governed by what the services rendered were reasonably worth."

2. There can be no recovery in the absence of evidence for which the value of services can be properly determined.

In *Brown vs. White*, 51 A. 962 (Penna.), the questions there involved being (p. 965); "in the absence of any evidence of the value of such (medical) services, or what they are reasonably worth, was the plaintiff entitled to recover?"

The Court held:

"A jury should not be allowed to estimate expenses incurred by one for medical services rendered her by physicians; there being no evidence of what she paid therefor, or what they were reasonably worth. A verdict should be supported by legal evidence; otherwise it is the result of the whim, caprice or guess of the jury."

In *Duke vs. Missouri Pac. Railway Company*, 99 Mo. 170, cited also in Sedgwick on Damages, 9th Ed. Vol. I, p. 323, an action for personal injuries where it was shown that nothing had been

paid by the plaintiff for medical services and no evidence was offered as to the value of the services rendered, it was held:

“When such damages are susceptible of proof with approximate accuracy and may be measured with some degree of certainty, they should not be left to the guess of the jury, even in cases *ex delicto*.”

See also *Gumb vs. Twenty-third Street Railway Co.*, 21 N. E. 993 (N. Y.)

It was held in *Carter vs. Nunda*, 66 N. Y. Supp. 1059, that evidence of the number of visits of a physician is insufficient to pass upon the value of such services.

In 8 Am. & Eng. Enc. Law. p. 645, the following is to be found:

“It is agreed that in personal injury cases, if plaintiff is entitled to recover at all, *an element of his damages is the necessary and reasonable expense incurred by him for medical treatment for the injury suffered.*”

(Italics supplied).

In *Carter vs. Nunda*, 66 N. Y. Supp. 1059, the appellate court held:

“There is no fixed and definite schedule of charges of which a jury may take judicial notice by which the value of professional ser-

vices may be determined, and their value is not a matter of such common knowledge that jurors may be permitted to appraise the same unaided by other evidence."

In *International and G. N. R. Co., vs. Sampson*, 64 S. W. 692, it was held that proof that doctors' bills were incurred and paid would not authorize their submission as elements of damage to the jury in the absence of evidence that the bills were reasonable in amount.

In *Schempf vs. Steter*, 19 N. Y. Supp. 644, it was held error to allow proof of the amount paid by plaintiff to his physician without showing the value of the services.

In *Wheeler vs. Tyler S. W. R. Co.*, 43 S. W. 876, it was held that where there was no proof of the value of the medical services rendered, or that the amount of the bill paid by plaintiff was reasonable compensation for such services, it was error to submit to the jury the question of the medical bill.

We respectfully urge that the weight of authority is:

That there can be no recovery for medical services without proof of the value and their reasonableness and that such services were necessary.

From all the evidence offered by the appellees, as herein set forth, there is none to show the value

of the services of Doctors Peer or Burns save only the two purported bills regarding which the witness Leys testified were unpaid. There was no legal evidence offered to show the value of the services rendered or that they were necessary and the charges reasonable. No opportunity was given the appellant to cross-examine the two physicians to determine the course and extent of treatment, if any, that was given the appellee, Frank Gladson Leys. Likewise, no opportunity was given appellant to examine the physicians as to the charges alleged to have been made to determine their reasonableness, all of these being essential in order that the jury might have before it the true picture and only from which they could arrive at a true and proper verdict. All of these elements were susceptible of proof and such proof not having been offered in support of the purported bills, the alleged charges are legally meaningless, in the light of the authorities herein cited.

CONCLUSION.

We respectfully urge that the action of the trial justice in admitting into evidence the alleged bills identified by the witness Leys was error. We further urge that there is no testimony in the whole case to bear out a verdict based on the two alleged bills and the return of one necessarily must have been based on guess on the part of the jury.

We respectfully urge that the judgment of the Supreme Court of the District of Columbia was wrong and should be reversed.

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~~COURT OF APPEALS~~
DISTRICT OF COLUMBIA
FILED

MAR 26 1932

IN THE *Henry W. Hodges*
Court of Appeals, District of Columbia

OCTOBER TERM, 1931.

No. 5536.

DISTRICT OF COLUMBIA, *Appellant*,

vs.

FRANK GLADSON LEYS, *Appellee*.

No. 5537.

DISTRICT OF COLUMBIA, *Appellant*,

vs.

ROBERT H. LEYS, *Appellee*.

BRIEF FOR APPELLEES.

ALVIN L. NEWMYER,

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IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1931.

No. 5536.

DISTRICT OF COLUMBIA, *Appellant*,

VS.

FRANK GLADSON LEYS, *Appellee*.

No. 5537.

DISTRICT OF COLUMBIA, *Appellant*,

VS.

ROBERT H. LEYS, *Appellee*.

BRIEF FOR APPELLEES.

STATEMENT OF CASE

This is an appeal from two judgments of the Supreme Court of the District of Columbia in favor of the appellees (plaintiffs below) entered upon the ver-

dicts of a jury. The action by the appellee, Frank Gladson Leys, was to recover damages for personal injuries sustained as a result of the alleged defective condition of a certain public sidewalk negligently maintained by the District of Columbia. (R. 3, 4, 6.) The action of the appellee, Robert H. Leys, husband of the appellee, Frank Gladson Leys, was to recover for loss of consortium and for medical expenses incurred by the husband. (R. 11, 12.)

The basis for recovery in the two actions was dependent upon the same facts and principles of law, being different only in the quantum of damages recoverable. A consolidation of the two causes for trial was agreed upon and so ordered by the court. (R. 8.)

The case was heard before the court and jury and a verdict was returned for the appellee Frank Gladson Leys for \$7500 (R. 8), and for the appellee Robert H. Leys for \$200. (R. 16.) The appellant moved the court for a new trial in both cases. These motions were argued and overruled and judgments entered upon the verdicts. (R. 9, 17.)

The appellee's proof tended to show that the appellee, Mrs. Frank Gladson Leys, is the wife of the appellee, Robert H. Leys; that they were, on January 17, 1926, and still are residents of Whitestone, Long Island, New York; that Mrs. Leys was an accomplished organist and had, on the afternoon of January 17, 1926, played at the Church of the Epiphany in the District of Columbia. (R. 30.) After playing at the church on said date Mr. and Mrs. Leys were lawfully engaged in walking on the sidewalk on the south side of B St., S. E., between First and Second Sts., S. E., for the purpose of going to Cornell's Restaurant at 109 B St., S. E., to have dinner (R. 30, 34); that "it was dark, a pretty dark night"; that it had been raining

slightly and was muddy but not slippery and that there was no ice on the sidewalk. (R. 30.) While so engaged in walking Mrs. Leys was suddenly thrown to the sidewalk as a result of stepping into a hole in the brick sidewalk in front of 107 B St., S. E., near the building line between 107 and 109 B St., S. E. (R. 32.) That the sidewalk in front of 107 B St., was constructed of bricks from the building line to the center part of the sidewalk and from thence to the curb of asphalt blocks; that the brick part of the sidewalk was the original sidewalk without repair laid about 41 years ago (R. 24); that the hole in the sidewalk was of oval shape, about 2 feet in circumference and 3 or 4 inches deep, was full of mud and contained only a half brick (R. 31); that Mr. Leys, immediately after Mrs. Leys fell, put his hand down along her foot and in the hole there was a loose half brick which he extracted from under her foot. The testimony also showed, without contradiction, that there were no bricks in the sidewalk in front of 109 B St., but that entire sidewalk was paved with cement (R. 24). Mr. Leys himself picked up Mrs. Leys, that she was bleeding, her teeth were broken, and that he carried her to Dr. Moffett's office (R. 31) located nearby at 127 B St., S. E. (R. 29). Dr. Moffett treated Mrs. Leys for a cut on the forehead and injuries to her hand which upon diagnosis showed a condition known as exostosis of the bone (R. 23); that the condition of Mrs. Leys when she was carried into Dr. Moffett's office, besides the cut on her forehead and the condition of her hand, was that her mouth was bloody and her lip was cut and her right knee and right ankle bruised. Mrs. Leys complained particularly of her hand, knee and ankle; that the exostosis of her hand was very painful; that this condition was due to a fracture of the bone or the

breaking of the periosteum and to a person of her age an operation would be of no value, and, that the injury to her hand has incapacitated her to the extent of making it difficult even to dress. (R. 23, 34.) Dr. Moffett treated Mrs. Leys for three successive days, when she returned to New York. She was treated in New York by Dr. Peer of Flushing, L. I., and Dr. Burns of Seacliff, L. I. (R. 31.) The evidence tended to show that Dr. Peer had continued to treat Mrs. Leys since her return to New York, for the permanent injuries to her hand, and that Dr. Burns treated her, on occasions, when she was in Oyster Bay.

Testimony by Mr. Leys that he accompanied his wife on her visits to the doctors and that "Dr. Peer's charges total \$250 and Dr. Burns' charge is \$500," was admitted without objection. (R. 31.)

The introduction of the two bills (merely cumulative to evidence already admitted without objection) was objected to and the bills themselves were admitted over defendant's objection and exception. (R. 31-32.)

The testimony of Dr. Moffett, after stating the nature and extent of the injuries, was that he had lived in the locality for approximately 40 years and was familiar with the brick and asphalt sidewalk in front of 107 B St., S. E., and that it was not in good repair since the bricks therein had been worn to half their natural size and had become rough and loose. Further testimony as to the defective condition of the sidewalk in front of the premises 107 B St., S. E., was presented by John F. Ford, an employee of Cornell's Restaurant, 109 B St., S. E., who had been in the employ of said restaurant since 1925 (R. 29), and who testified that some of the bricks were sunken, that the sidewalk was very rough and uneven and that at a point on the sidewalk in front of 107 B St., and near

the dividing line of 109 there was a cave-in; it was a space something like two feet, and the depression was the width of six or eight bricks and was three or four inches lower than the rest of the surface of the sidewalk, that the first time he noticed this condition was sometime in the summer of 1925, shortly after he went to work there and it was in the same condition in January, 1926. He drew a diagram on a blackboard showing the location of the depression at the junction of the brick portion of the sidewalk with the asphalt block portion of the sidewalk, and in front of premises 107 B St. on and contiguous to the dividing line between premises 107 and 109 B St. (R. 29, 30.)

Several witnesses of the appellant including several policemen were heard and their negative testimony that they did not observe any defect tended to contradict the evidence produced by the appellee as to the condition of the sidewalk, but only insofar as they did not notice its alleged defective condition. (R. 36 to 42.)

The court properly charged the jury as to the issues involved. The jury were instructed that in order to return a verdict for the plaintiff it was necessary that they believe from a preponderance of the evidence that: First, the sidewalk in front of premises 107 B St., S. E., was in a defective condition, "but if you find that it was in a reasonably safe condition you need go no further" (R. 51) and "if after weighing all the evidence you are in doubt as to whether it was in such condition, then you need go no further, because your verdict would necessarily be in favor of the District of Columbia." Secondly, if there was a defective condition, would the District of Columbia have knowledge thereof. The Court then gave a clear and precise charge as to both actual and constructive notice.

(R. 51.) The jury were further instructed that if a doubt arose as to the notice "you should find in favor of the District of Columbia." Thirdly, if a defective condition is found to have existed, was that condition the cause of the fall. (R. 52.) The Court expressly charged the jury that the District of Columbia is not an insurer of pedestrians and the only duty upon the appellant was to use ordinary care to maintain its streets in a reasonably safe condition (R. 54), and that it was necessary to find that Mrs. Leys fell in front of premises 107 B St., S. E., and not 109 B St., S. E., in order to find for the plaintiffs. (R. 56.) As to Mr. Leys, the Court charged that he could not recover for loss of consortium because of lack of evidence thereon, but that he was entitled to reasonable medical expenses which he had incurred and for such amounts as he might reasonably have to incur in the future. (R. 56.) The instructions on the measure of damages as to Mrs. Leys were proper and were not objected to. (R. 53.)

The appellant's five assignments of error (R. 9) present but three questions to be determined on this appeal:

1. Assignment 5 alleges error in failing to direct a verdict for the defendant at the close of the entire case.

2. Assignments 1 and 4 allege error by the court in allowing the appellees to further amend their amended declaration (R. 6), which amendment changed the description of the place where the injuries were sustained, on the ground that the period of limitations had run.

3. Assignments 2 and 3 allege error by the court in admitting in evidence certain medical bills as evidence of expenses incurred by the appellee, Robert H. Leys, in the medical treatment furnished his wife.

Each of the above questions will be respectively treated in the following argument.

ARGUMENT

Point One

THE COURT DID NOT ERR IN OVERRULING THE MOTION FOR DIRECTED VERDICT.

As to extent of duty and liability of municipal corporations it is held that it is the duty of municipal corporations to so construct and maintain its sidewalks that they may be fit for the uses intended and reasonably safe against accident to those lawfully using them.

District of Columbia v. Woodbury, 136 U. S. 450; 34 L. Ed. 472.

Barnes v. District of Columbia, 91 U. S. 540; 23 L. Ed. 440.

District of Columbia v. Haller, 4 App. D. C. 405.

District of Columbia v. Caton, 48 App. D. C. 96.

District of Columbia v. Stephenson, 54 App. D. C. 297.

District of Columbia v. Bauer, 55 App. D. C. 280.

District of Columbia v. Berberich, 56 App. D. C. 12.

Though it is true that a municipal corporation is not an insurer of the safety of pedestrians lawfully using its highways, it is nevertheless liable for failure to use reasonable care not only in remedying defects found to be existing but also to use reasonable care to discover such defects as might be discovered by reasonable diligence.

District of Columbia v. Woodbury, supra.

Whether or not the District of Columbia had notice, actual or constructive, was properly left to the deter-

mination of the jury with instructions in accord with the doctrine of *District of Columbia v. Woodbury*. The principle of the Woodbury case is quoted in appellant's brief at page 20. The court instructed the jury in the instant case as follows (R. 51):

“Did the District of Columbia have notice, or knowledge of the defect—of this alleged defect? Of course, if there was no defective condition, they did not have knowledge. It is only on the assumption that you find this first question in favor of the plaintiff that you need proceed on with these other questions.

“Did the District of Columbia have knowledge of the defective condition of the sidewalk? Is there any evidence which leads you to believe that the District of Columbia should have known, or did know, that this sidewalk in front of 107 B St. was in a dangerous condition?

“I do not understand it to be claimed by the plaintiffs that the District of Columbia had actual knowledge, that is, that some responsible agent or officer of the District of Columbia had actually seen and observed the condition of the street; but it is claimed that it had what we term in law constructive notice or knowledge in this, that the dangerous condition had existed a long time prior to the accident—a sufficient time so that had the District of Columbia, in the exercise of its municipal functions, given reasonable care or inspection and repair to the sidewalk, it would in the course of that duty have observed the condition and remedied it; that it had ample time to do it.

“If you believe that the District of Columbia did not have notice, that is, circumstances were not such, conditions were not such as to give reasonable time for notice to have gotten to the District of Columbia in the manner I have suggested, then your verdict must be in favor of the District of Columbia. Or if upon that question a doubt

arises on all of the evidence, you should find in favor of the District of Columbia.”

This instruction, it is submitted, correctly stated all the elements of municipal liability and notice, as prescribed by the Woodbury case.

District of Columbia v. Stephenson, supra.
District of Columbia v. Boswell, 6 App. D. C. 402.
Moynihan v. City of Holyoke, 193 Mass. 26; 78
 N. E. 742.
Kunz v. City of Troy, 104 N. Y. 344, N. E. 442.

In *District of Columbia v. Boswell* this court said:

“The defect does seem to be a slight one, from a general point of view, and one that may not have attracted the attention of ordinary passers-by who do not come in contact with it. * * * We have no right to reverse the judgment for error in refusing to direct a verdict for the defendant unless thoroughly satisfied that no recovery could properly be had by the plaintiff upon any view that could be taken of the facts the evidence tends to establish.”

Gardner v. Michigan City R. R. Co., 150 U. S. 349; *Washington Gas Co. v. Poore*, 3 App. D. C. 127.

“The learned justice who presided at the trial may have believed that there was culpable negligence on the part of the defendant, or he may have been uncertain as to its existence. In either event, the question was necessarily for the determination of the jury.”

In the *Holyoke* case it was held where a pedestrian fell on to the sidewalk because of its alleged defective condition, that it was a question properly for the jury

to determine whether there was a defect which might have been remedied by reasonable care and diligence on the part of the city. There the evidence tended to show that the defective condition was due to the walk having become very smooth because of continued use.

The cases herein cited are unanimous in support of the general rule that it is within the province of the jury to determine whether or not there was actual or constructive notice of the alleged defective condition.

In *Potomac Electric Power Co. v. Hemler*, 47 App. D. C. 34, it was held that a defective gas box in the sidewalk, which condition existed only two weeks, was sufficient to warrant a finding that the District of Columbia had, or should have had, notice thereof; and, in *Moriarty v. City of New York*, 116 N. Y. S. 323, it was held that the existence of the obstacle in the walk for two weeks was sufficiently long time for the City authorities to be held to notice of its existence.

The appellee had the right to assume the safety of the sidewalk and was not bound to look out for special danger thereon.

District of Columbia v. Haller, 4 App. D. C. 405.
Pettengill v. Yonkers, 116 N. Y. 558, 22 N. E. 1095.

The appellant, at page 26 of its brief, quotes the answer by the appellee Robert H. Leys to the appellant's question whether Mrs. Leys fell in front of premises 107 or 109 B St., S. E., and stresses the answer by Mr. Leys in which he testified that, "I do not know where the dividing line is between 107 and 109." It is a non sequitur to so argue, for Mr. Leys did testify that the fall occurred on that portion of the sidewalk which was made of brick; that the sidewalk in front of 109 B Street was not brick but cement; and that when the

fall occurred, Mr. Leys placed his hand down along her foot and in the hole there was a loose half brick which he extracted from under her foot. Mr. Leys further testified at page 33 of the record:

“I can take you out and show you the spot, if you want to go now, and you will see that it is 107, that is right, up there, on the first part of the building, and 109 is on the other one and where the dividing line is, I do not know where the dividing line is. I did not measure it.”

The appellant's brief at page 28 states: “Taking the testimony of the witness Robert H. Leys in its most favorable light an inference or a mere scintilla of evidence is available that it occurred in front of 107 B St., S. E.”

What constitutes a “scintilla” is defined in Anderson's Dictionary of Law to be “A spark, a glimmer, the smallest particle,” and is defined in 35 Cyc. 1146 to be “a spark, a glimmer, the smallest trace, the least particle, the faintest ray.”

It is probably incorrect to contend that inference and scintilla are synonymous. An inference based on direct testimony is itself direct, and it is submitted its quantum, force and weight are to be considered in the light of the direct testimony. However, a scintilla, as the definitions suggest, is more remote and fragmentary. In the instant case the directness of the testimony of the witness, Robert H. Leys, on its face removes his testimony from the sphere of “scintilla of evidence.”

It is submitted that this testimony is to be treated as direct evidence and legitimate inference rather than to be strained and extended into the scintilla evidence rule pronounced in *Gunning v. Cooley* cited on page 28

of appellant's brief. The evidence not only establishes the negligence charged sufficiently to be submitted to the jury, but fairly proved that the proximate cause of the plaintiff's injuries was the defective condition of the sidewalk negligently maintained by the appellant and that the District had notice thereof. To determine these facts the jury was not required to speculate or conjecture but had sufficient direct testimony of disinterested witnesses before it to find such facts.

The United States Supreme Court in *Gunning v. Cooley*, 281 U. S. 90, 94, 74 L. Ed. 720, 724, said:

“Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. (Citations.) Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. (Citations.)”

On all the evidence and circumstances deduced at the trial, as reproduced in the record, it is apparent that the burden imposed by law upon the appellees was sufficiently maintained. It is contrary to settled principles of law to contend, in view of the weight of the evidence produced, that the court should have removed the case from the consideration of the jury and ren-

dered a directed verdict. A reasonable view of all the evidence presents a case in which the appellees produced as much evidence as was physically within their power, which evidence presented questions of the fact to be determined, which the court properly submitted to the jury.

Point Two

THE AMENDMENTS TO THE DECLARATIONS WERE PROPERLY ALLOWED

The injuries sustained by Mrs. Leys occurred on January 17, 1926. Declarations in behalf of Mr. Leys and Mrs. Leys were filed on December 11, 1928. (R. 2.) Amended declarations were filed on January 18, 1929, and an amendment to the amended declarations was filed on May 14, 1931. (R. 6.) The appellant assigns as error the ruling of the court in allowing the amendment last referred to, and though the appellant has failed to make this alleged error a subject of argument in its brief the appellee presents the following authorities in support of the court's ruling:

Schneider v. American Bridge Co., 31 App. D. C. 420.

Willey v. Stormont, 38 App. D. C. 399.

Schrot v. Schoenfeld, 23 App. D. C. 421.

Steven v. Saunders, 34 App. D. C. 321.

Featherstonhaugh v. Moore, 48 App. D. C. 35.

In *District of Columbia v. Fraser*, 21 App. D. C. 154, the declaration alleged negligence by the city in failing to keep its sidewalk free from obstructions and danger to pedestrians and failure to strew sand thereon when covered with ice. A declaration was filed by the plaintiff for personal injuries sustained within the statutory

period and amendment to said declaration was allowed after the statutory period, which amendment omitted all mention of the city's duty as to strewing sand, etc., upon ice covered sidewalks, but charged that for some time prior to the accident the sidewalk, at a certain place, had become defective and dangerous and that large quantities of ice were permitted to accumulate thereon. As to the defendant's contention that it was improper to allow the amendment after the statutory period, the court said at page 158:

“Where, as in this case, there has been a substitution of the original declaration by an amendment, the test is whether the cause of action remains the same in substance, notwithstanding differences of specification. *Howard v. Railway Co.*, 11 App. D. C. 300, 336; *T. & P. Ry. Co. v. Cox*, 145 U. S. 593, 604.

“Applying this test, we are of opinion that there was no error in overruling the plea of limitations. The foundation of the action, in both pleadings, is the negligence of the defendant in the performance of its duty to keep its sidewalks in a safe condition.”

In *Neubeck v. Lynch*, 37 App. D. C. 575, this court said:

“It should not be the policy of the courts to defeat justice by indulging in mere technicalities and fine spun theories of pleading. Where an amendment does not operate totally to confer jurisdiction, or to change the cause of action or shift the right of action, but merely supplies an additional element essential to a proper statement of a cause of action defectively stated * * * it should be allowed.

In an action where the original declaration alleged that death resulted from inadequate medical attention after the sickness began, the amended declaration alleged that death was due to negligence in failing to provide plaintiff with proper and good food, the court said in *U. S. Shipping Board Emergency Fleet Corporation v. Greenwald*, 16 F. (2d) 948:

“It is claimed that this amendment sets forth a new and different cause of action than that alleged in the original complaint and that such action is barred by the Statute of Limitations. The majority of this court are of the opinion that the allegations of the amended complaint are but an amplification of the allegations of the original complaint and do not set forth a new cause of action.”

In *Gail v. City of Philadelphia*, 273 Pa. 275, 117 A. 69, it was held proper to allow plaintiff to amend his declaration after the period of limitations. The facts of the case were very similar to those in the instant case. After an examination of the authorities, the court said:

“Complaint is made of the allowance of an amendment to the original statement of claim, locating the hole in the street, into which plaintiff fell, as opposite house No. 821, instead of 877 and 879, as first averred. . . . It is insisted that error was committed in allowing the change to be made after the running of the Statute of Limitations. Such course will not be permitted where the alteration proposed is a matter of substance, but there was no change in the cause of action here, or substitution of any new party, and the rule laid down, under similar circumstances, in *Phillips v. Erie County Elec. Co.*, 249 Pa. 445, 94 A. 1070, was properly applied by the court below.”

In *Phillips v. Erie County Elec. Co.*, *supra*, plaintiff sued for wrongful death of her husband, caused by negligence of defendant. The declaration originally alleged the scene of the accident at 21st and S Sts. An amendment to the declaration was allowed after the running of the Statute of Limitations by which the crossing at 22nd and S Sts. was made the place of the accident. The court said: "The amendment did not change the measure of the damages nor the evidence required to prove the cause of action set forth in the statement."

Point Three

TESTIMONY AND BILLS FOR MEDICAL EXPENSES INCURRED BY THE APPELLEE, ROBERT H. LEYS, WERE PROPERLY ADMITTED IN EVIDENCE IN HIS BEHALF.

On direct examination Robert H. Leys testified as to the medical expenses incurred in the treatment of Mrs. Leys by Dr. Moffett, Dr. Peer and Dr. Burns. The testimony of Mr. Leys and corroborated by the testimony of Mrs. Leys, tended to show the frequency of the visits to Dr. Peer and Dr. Burns in New York and that the treatment given was solely for the condition of Mrs. Leys' hand, for the injuries sustained as a result of the fall complained of. The court admitted this testimony without objection. Mr. Leys offered the bills presented by Dr. Peer and Dr. Burns for their services in the treatment of Mrs. Leys. These bills were admitted in evidence over the appellant's objection. (R. 31, 32.) The appellant assigns as error that the bills were not the best evidence since Dr. Peer and Dr. Burns in New York were available witnesses and that further evidence of the reasonableness of the charge was necessary. (R. 10, 32.) The admission of

this evidence was solely on behalf of the cause of action of the appellee, Robert H. Leys, and, by the instructions of the court, had no relation to the quantum of recovery by Mrs. Leys. The Court specifically instructed the jury that if Mr. Leys did have a right to recover, he was entitled only to a reasonable amount for expenses incurred. (R. 55.) It is submitted that no error was committed in this respect. The court further instructed the jury that Mr. Leys was not entitled to recover for the loss of society of his wife as alleged in the declaration because of the failure of the evidence to show loss of society. The verdict returned by the jury for Mr. Leys, for medical expenses incurred, was only \$200. The total of the bills of Dr. Peer and Dr. Burns, introduced in evidence, was \$750. (R. 32.) It is, therefore, apparent that the jury strictly complied with the instructions of the court in awarding only a reasonable amount for medical expenses incurred and did not accept the bills as conclusive evidence of their value.

Recovery for medical expenses is generally limited to only a reasonable amount. The reasonableness of the expenses incurred is an ordinary question of fact to be determined by the jury from the evidence. Direct evidence as to the reasonable value of medical expenses is not necessary, but the jury may determine it from the character of the injury and of the medical services and treatment as shown by all the evidence.

In *Western Gas Construction Co. v. Danner*, 97 F. 882, it was shown that the plaintiff has become liable for doctor bills up to \$300 for treatment as a result of injury sustained by virtue of the defendant's alleged negligence. Only one doctor appeared as a witness and though he testified that his charge was \$100, did

not testify that such charge was a reasonable charge. The court after stating that there was no direct evidence as to whether all of the charges were reasonable or not, said:

“The reasonableness of the charge in such cases does not solely depend upon the testimony of experts, although such testimony is proper, and entitled to weight, and is usually given as an aid to the jury in determining the proper amount to be allowed; but the jury have the right, in this connection, to consider the character and extent of plaintiff’s injury and the extent and character of the medical services and treatment that he received, and from all the evidence determine the amount that should be given.”

After stating that the above rule is that prevailing in the federal courts, the court cites as authority in accord with the Federal rule the two leading cases in Massachusetts and New York:

Colwell v. Railway Co., 57 Hun (N. Y.) 452, 10 N. Y. S. 636.

Scullane v. Kellogg, 169 Mass. 544, 48 N. E. 622.

In the Colwell case the question was whether the plaintiffs statement that \$100 had been paid to a nurse for treatment was admissible without additional information as to the nature of the services and the reasonableness of its value. The defendant contended that the plaintiff could not recover the amount thus stated because the plaintiff failed to produce evidence to show the reasonableness of the charge. The court held that the amount was to be considered with other circumstances, such as the extent of the injuries and necessity for treatment to determine the reasonable-

ness of the charge, and that such determination was in the province of the jury under proper instructions.

In *Scullane v. Kellogg*, *supra*, the only evidence of medical services rendered was the plaintiff's testimony that a physician treated the plaintiff a certain number of times at the plaintiff's house, and the court said.

“Although there was no distinct proof of the amount of the expenses of sickness or medical attendance, yet in view of the evidence as to the physicians services, the jury might allow a reasonable sum.”

As a corollary to the general proposition that a recovery for medical expenses incurred is limited to a reasonable amount, it is equally true that medical bills for such services and liabilities incurred are proper for the consideration of the jury as evidence of the value of such services.

Townsend v. Keith, 34 Cal. App. 564, 168 P. 402.

Allen v. Durham Traction Co., 144 N. C. 288, 56 S. E. 942.

Coleman v. Nelson, 224 Ky. 460; 6 S. W. 2nd. 454.

Pinder v. Wickstrom, 80 Ore. 118, 156 P. 583.

In *Townsend v. Keith*, *supra*, the court said:

“The court did not err in overruling defendant's objection to the question asked of plaintiff as to what bills he had incurred on account of services rendered by his physicians and for hospital treatment. While the correct measure of damage is the necessary and reasonable value of the services rendered, rather than the amount which may have been paid for such services, nevertheless the amount paid is some evidence as to their reasonable value.”

In the case at bar, however, the court instructed the jury in accordance with both the reasonable recovery rule and the rule that the bills were evidence of the value of the services by giving the following instructions. (R. 55.)

“As the husband of Mrs. Leys, and legally responsible for her care, he claims damages for expenses to which he has been put in the treatment of Mrs. Leys, and claims on this evidence that he will have to incur future expenses for the injuries from which she claimed to be suffering.

“You heard the evidence as to his expenses up to the present time. It is for you to say whether you will take the evidence as satisfactory, whether you believe it, whether it establishes by a fair preponderance of the evidence that he has been put to that amount of expenses up to the present time. Then you will determine from all of the evidence whether you believe the injury is of a nature that she will suffer from it in the future, and applying your best judgment determine a sum which you think may reasonably be incurred by him on account of future expenses in the treatment and care of his wife.”

The verdict of \$200 rendered for Mr. Leys was in accordance with the instructions and was distinct and separate from the instructions as to the amount of recovery by Mrs. Leys. The instructions in the two cases as to the amount of damages were based on different principles of law and the jury were so instructed.

In *Coleman v. Nelson, supra*, the husband testified as to the expenditures made by him in providing medical care for his injured wife and introduced in evidence the bills he had paid. The trial court admitted

these bills over defendant's objection that it was hearsay and that the accounts and bills should have been proved by those rendering the services. As to this, the court said:

"He testified that the expenditures represented by the bills which were submitted to him for payment, were brought about solely because of the injury to his wife. He had actually paid them. It is true as to some of the accounts and bills there was no evidence that the charges were reasonable, but they were submitted in the usual course of business and paid by Nelson. We are not willing to say that admission of this evidence was incompetent."

"Proof of the amount paid or of the liability incurred is some evidence, however, of the value of the services, and if it does not appear unreasonable from the evidence, the court will not so presume it. 8 R. C. L. 498.

Gibler v. Terminal R. Association, 203 Mo. 208, 101 S. W. 37.

Clark v. Westott, 37 N. Y. S. 1111.

Birmingham R. L. & P. Co. v. Girod, 164 Ala. 10, 51 So. 242, presented the question of the right of the husband to recover for medical treatment expended for his wife, where the evidence showed only the amounts expended and the liabilities incurred but no evidence was introduced as to the reasonableness of the charges. The court said:

"True, the measure of the recovery for such items is the reasonable value for the cost thereof and not what was actually paid or contracted to be paid. It does not appear that the amounts paid,

or anyone of them, was unreasonable, and can the court presume that it was in the absence of proof? If there be any presumptions (and we do not say there is), would it not be that the amounts paid were reasonable, rather than that they were unreasonable? . . . Neither the Trial Court nor this court can know that these amounts were unreasonable. They are as liable to be less than the reasonable value as to be more."

Vedder v. Delaney, 122 Iowa 583, 98 N. W. 373, presented a situation where the plaintiff was treated at the County Poor House and was not liable to pay for services rendered, but after treatment promised to pay therefor. In the action against the defendant who negligently caused the injuries, the court in allowing the plaintiff to testify as to the amount agreed to be paid for the medical services, said:

"Proof of what the plaintiff has in fact paid for such necessary services is some evidence of their reasonable value, and is sufficient to justify the submission of the question to the jury."

In some jurisdictions the courts have treated questions of damages differently from other questions of fact and have allowed the jury to place a value from their own general knowledge.

Washington v. Pac. E. R. R. Co., 112 P. 904 (Cal. app.).

St. Louis, etc., Ry. v. Stell, 87 Ark. 308, 112 S. W. 876.

Moran v. Dover Street Railway, 74 N. H. 500, 69 A. 884.

In *St. Louis, etc., Ry. v. Stell*, *supra*, the plaintiff had not as yet received bills for services from his phy-

sicians but it was held proper for the jury to award damages therefor without such proof after the plaintiff's testimony as to the extent of his injuries and treatment.

Moran v. Dover Street Railway was a case on similar facts where the defendant moved the court that the plaintiff would not be entitled to recover for medical expenses since the evidence totally failed to show that the expenses incurred were reasonable.

This motion was denied and on appeal the court, after discussing the rule as contended for by the appellant, then said:

“In other jurisdictions the rule is that jurors have some knowledge in common with men in general as to the charges ordinarily made by physicians for attendance and services and that they may avail themselves of that knowledge for the purpose of determining what sum the plaintiff should have by reason of the expenses he has properly and reasonably incurred in endeavoring to effect a cure. (Citations.) The latter rule appears the more reasonable, and is in accord with the practice at nisi prius in this State.”

If there were error by the court in admitting in evidence the bills for medical services rendered by Dr. Peer, and Dr. Burns, it is submitted that such error was harmless, as the verdict of the jury for appellee, Robert H. Leys, was for \$200 and the total of the bills admitted in evidence was \$750.

In *Abbitt v. St. Louis Transit Co.*, 104 Mo. App. 534, 79 S. W. 496, which was an action for damages brought by the husband for medical expenses incurred in the treatment of his wife who was injured as a result of the defendant's negligence, the court held that

the bills themselves were some evidence that the charges made by the physicians were reasonable and in the absence of said evidence on the point, was sufficient to support a verdict for the amount so charged. There the list of expenses presented to the court amounted to \$808 and the jury returned a verdict for \$500.

The court in holding this to be harmless error said:

“The verdict was for but \$500, though testimony was adduced to disprove the expenses and loss plaintiff said he sustained. To reverse the judgment we must not only find error was committed but that the error was not palpably harmless to the appealing party.”

The Abbitt case is further authority for the proposition, which needs no further citation, that the verdict for the husband is separate and distinct from the verdict rendered for the wife and that possible error in the rendition of one cannot be deemed to impair the validity and legality of the other.

The fact that there was evidence in the case, without objection, by Mr. Leys to the effect that Doctor Peer's charges total \$250 and Doctor Burn's charges \$500 placed those facts in evidence without objection and gave the jury the right to consider them, and as the defendant did not object to that testimony and took no exception to it, the defendant cannot now object to it. The bills themselves, to which objection was made, added nothing, and was merely cumulative testimony, the admission of which is not regarded in an appellate court as prejudicial.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the case was properly submitted to the jury, upon correct instructions as to the law, and that the verdicts are in accord with the law and the evidence and the judgments should be affirmed.

Respectfully submitted,

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